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IN THE

Supreme Court of the United States

October Term, 1965

No. 429

WILLIAM L. MAXWELL,

Petitioner,

v.

DAN D. STEPHENS, Superintendent of Arkansas State Penitentiary.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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October Term, 1965

No. .....

WILLIAM L. MAXWELL,

Petitioner,

v.

DAN D. STEPHENS, Superintendent of Arkansas State Penitentiary.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on June 30, 1965.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit (C.A. 1)[1] and the dissenting opinion of Judge Ridge (C.A. 24) are as yet unreported. They are set forth in

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[1] The certified record, which is not printed, consists of six volumes. Volume I contains the record of proceedings in the district court except for the transcript of the hearing. It is cited as D.C. ——.

Volumes II and III, paginated consecutively, contain the complete record of proceedings in the Garland County Circuit Court and are cited as Ark. ——.

Volume IV is the transcript of the hearing in the district court and is cited as Tr. ——.

Volume V contains depositions and is not cited in this petition.

Volume VI contains the opinion and orders of the court of appeals and is cited as C.A. ——.

the appendix,[2] pp. 2a, 26a. The opinion of the United States District Court for the Eastern District of Arkansas (D.C. 39) is reported at 229 F. Supp. 205 and is set forth in the appendix, p. 30a. The opinion of the Supreme Court of Arkansas is reported at 236 Ark. 694, 370 S.W. 2d 113 and is set forth in the appendix, p. 55a.

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was rendered on June 30, 1965 (C.A. 28). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Petitioner, a Negro, was detained at the police station on suspicion of rape of a white woman. His requests to use a phone to call a lawyer or his family at home were denied. Two white policemen went to his home at 5:00 a.m. to obtain evidence. They had no warrant. Only petitioner's mother and two younger brothers were at home. The policemen were admitted by petitioner's mother. They searched petitioner's room and obtained a coat belonging to him. The coat was used at his trial, which resulted in a sentence of death.

a) Where petitioner's mother was visibly upset, did not know of her right to resist a warrantless search, and was not informed of that right, did her acquiescence in the search and seizure satisfy the requirements of voluntariness and understanding requisite to waiver of Fourth-Fourteenth Amendment rights?

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[2] The appendix is separately bound.

b) If the answer to question (a) is yes, did acquiescence by petitioner's mother waive petitioner's Fourth-Fourteenth Amendment rights as well as her own?

2. Where petitioner, a Negro sentenced to death for the rape of a white woman, has shown that nine times as many Negroes as whites have been executed for rape in Arkansas although in three representative counties (to which inquiry was limited) an equal number of Negroes and whites have been convicted of rape, may the State deny that racial discrimination violating the equal protection clause of the Fourteenth Amendment produced such a result without submitting proof that impartial and non-arbitrary factors explain the grossly disproportionate number of Negro executions?

3. Does Arkansas' granting to the jury of unfettered discretion to impose capital punishment for all offenses of rape, irrespective of the existence of aggravating circumstances, permit cruel and unusual punishment in violation of the Fourteenth Amendment?

4. Did the system of selecting petit jurors used in Garland County satisfy the equal protection clause of the Fourteenth Amendment where the qualifications of all prospective jurors were determined by reference to poll tax books which, pursuant to state statute, designated the race of each elector?

Constitutional and Statutory Provisions Involved

This case involves the Fourth, Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

This case also involves the following Arkansas statutes:

ARKANSAS STATUTES ANNOTATED, §3-118 (1956):

3-118. *List of poll tax payers furnished county clerk and election commissioners.*—Not later than the 15th day of October of each year the collector shall file with the county clerk a list containing the correct names, alphabetically arranged (according to the political or voting townships, and according to color) of all persons who have up to and including October 1st of that year paid the poll tax assessed against them respectively. The correctness of this list shall be authenticated by the affidavit of the collector in person. The county clerk shall at once record the said list in a well bound book to be kept for that purpose . . . .

ARKANSAS STATUTES ANNOTATED, §3-227 (1956):

3-227. *Evidence of right to vote—Filing and return of documents—Additional list of voters—Poll tax receipts, requirements—Certified poll tax lists—Rejection of ballots.*—No person shall be allowed to vote at any primary election held under the laws of this State, who shall not exhibit a poll tax receipt, or other evidence that he has paid his poll tax within the time prescribed by law to entitle him to vote at the succeeding general State election. Such other evidence shall be:

(a) A copy of such receipt duly certified by the clerk of the county court of the county where such tax was paid.

(b) Or, such person's name shall appear upon the list required to be certified to the judges of election by section three of Act 320 of Acts of 1909 [§3-118].

Or, if any person offering to vote shall have attained the age of twenty-one [21] years since the time of assessing taxes next preceding such election, which period of assessment is here declared to mean between the second Monday in May and the second Monday in September of each year, and possesses the other necessary qualifications, and shall submit evidence by written affidavit, satisfactory to the judges of election, establishing that fact, he shall be permitted to vote.

All such original and certified copies of poll tax receipts and written affidavits shall be filed with the judges of election and returned by them with their other returns of election, and the said judges of election shall, in addition to their regular list of voters, make an additional list upon their poll books of all such persons permitted by them to vote, whose names do not appear on the certified list of poll tax payers, and such poll books shall have a separate page for the purpose of recording names of such persons.

It shall be the duty of each elector, at the time of payment of his poll tax, to state, and it shall be the duty of the collector to record and certify in his receipt evidencing the payment of such poll tax, the color, residence, postoffice address (rural route, town or street address), voting precinct, and school district, of such person at the time of the payment of such tax, and all poll tax receipts not containing such requirements shall be void and shall not be recognized by the judges of election; provided, however, it shall not be necessary to state or have certified the street address of any such person in cities and towns where the numbering of houses is not required by the ordinances thereof.

The certified lists required by section 3 of Act 320 of 1909 [§3-118] shall contain, in addition to the name of the person paying such poll tax, his color, residence, post-office address (rural route, town, or street address where by ordinance the numbering of houses is required), the school district and voting precinct, and such list shall be arranged in alphabetical order, according to the respective voting precincts. The county election commissioners shall supply the judges of primary elections with printed copies of such lists. . . .

ARKANSAS STATUTES ANNOTATED §39-208 (1962):

Preparation of lists of petit jurors and alternates—Indorsement of lists.—The commissioners shall also select from the electors of said county, or from the area constituting a division thereof where a county has two [2] or more districts for the conduct of circuit courts, not less than twenty-four (24) nor more than thirty-six (36) qualified electors, as the court may direct, having the qualifications prescribed in Section 39-206 Arkansas Statutes 1947 Annotated to serve as petit jurors at the next term of court; and when ordered by the court, shall select such other number as the court may direct, not to exceed twelve [12] electors, having the same qualifications, for alternate petit jurors, and make separate lists of same, specifying in the first list the names of petit jurors so selected, and certify the same as the list of petit jurors; and specifying in the other list the names of the alternate petit jurors so selected, and certifying the same as such; and the two [2] lists so drawn and certified, shall be enclosed, sealed and indorsed "lists of petit jurors" and delivered to the court as specified in Section 39-207, Arkansas Statutes 1947, Annotated for the list of grand jurors.

ARKANSAS STATUTES ANNOTATED §41-3403 (1962):

41-3403. *Penalty for Rape.*—Any person convicted of the crime of rape shall suffer the punishment of death [or life imprisonment]. [Act Dec. 14, 1842, §1, p. 19; C. & M. Dig., §2719; Pope's Dig., §3405.]

ARKANSAS STATUTES ANNOTATED §43-2153 (1962):

43-2153. *Capital cases—Verdict of life imprisonment.*—The jury shall have the right in all case where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor.

Statement

Petitioner William L. Maxwell, a Negro, was charged by information for the crime of rape on November 7, 1961 (Ark. 1). He was convicted in the Circuit Court of Garland County, Arkansas, and sentenced to death on April 5, 1962 (Ark. 42). The conviction was affirmed by the Supreme Court of Arkansas, and rehearing was denied.

A petition for writ of habeas corpus was filed in the United States District Court for the Eastern District of Arkansas on January 20, 1964 (D.C. 1). It alleged, *inter alia*, that the number of Negroes on jury panels in Garland County was systematically and intentionally limited through the use of poll tax books designating the race of qualified jurors (D.C. 2-3). On January 21, 1964, the district court issued an order to show cause and a stay of execution (D.C. 6). On January 31, 1964, the court permitted an amendment to the habeas corpus petition alleging that clothing of petitioner was seized during an unlawful search and introduced at trial (D.C. 11-13). On February 12, 1964, petitioner filed a second amendment, alleging that Ark.

Stat. Ann. §41-3403 (1962 Repl. Vol.), providing for the death penalty upon conviction of rape, was applied with unequal severity against Negroes (D.C. 33). It was alleged that imposition of the death penalty in rape cases not involving loss of life was erratic and in conflict with the mores, principles and basic concepts of fairness of civilized societies (D.C. 34). At the hearing on February 12, 1964, the district court permitted the filing of the second amendment (Tr. 22).

Following the hearing held on February 12, 13, and 27, the district court dismissed the petition for writ of habeas corpus and vacated the stay of execution on May 6, 1964 (D.C. 62). On May 19, 1964, petitioner filed notice of appeal (D.C. 70). The district court granted a petition for certificate of probable cause for appeal and stayed execution pending appeal (D.C. 67).

The United States Court of Appeals for the Eighth Circuit affirmed on June 30, 1965 (C.A. 1, 28), Judge Ridge dissenting on the search and seizure issue (C.A. 24).

On July 13, 1965, the court of appeals granted a stay of the mandate for thirty days. If the clerk of the court of appeals receives within that time period a certificate from the clerk of this Court that a petition for writ of certiorari has been filed, the stay is to continue in effect until final disposition of the case by this Court (C.A. 29).

Search and Seizure

In his amended petition for the writ of habeas corpus, petitioner contended that his Fourteenth Amendment rights against unreasonable search and seizure had been violated by the use made at his trial of a blue coat seized from his

bedroom closet by police officers acting without a warrant (D.C. 11). The court of appeals found that the

> blue coat in question was obtained from that closet. It was eventually sent to the FBI laboratory. At the trial there was expert testimony that fibers in the coat matched others found on the victim's pajamas and on part of a nylon stocking picked up near the scene of the crime, and that fibers in the pajamas matched those found on the coat (C.A. 17).

Accordingly, the court of appeals—as had the district court—entertained petitioner's Fourth-Fourteenth Amendment contentions on the merits (C.A. 16; see D.C. 45). It rejected those contentions, finding that the warrantless seizure of the coat was validated by consent given the officers, in petitioner's absence following his arrest, by petitioner's mother (C.A. 23).

The facts surrounding the search and seizure may be concisely stated by adopting the findings of the court of appeals, with a few additions supported by the testimony of police officers or by the uncontradicted testimony of petitioner's witnesses in the district court. In the paragraphs which follow, the quoted portions are taken from the circuit court's opinion (C.A. 16-18); bracketed insertions with record references are from the transcript in the district court.

". . . The offense took place at approximately three o'clock in the morning of November 3, 1961. It was raining and wet. The victim was promptly taken by the police to a hospital. At the hospital she described her assailant to Captain Crain of the Hot Springs Police Department and to Officer O.D. Pettus, a Negro. She stated that the man had told her he was Willie C. Washington. Two persons with that name, senior and junior, were brought before her

but she identified neither. [A third Negro man was also brought in but not identified. (Tr. 256, 258, 262-263; testimony of Captain Crain and of the victim.)] She described her attacker in greater detail. Pettus thereupon suggested that it might have been Maxwell. Officer Childress, who was on car patrol duty and in uniform at the time, was directed by radio to pick up Maxwell. He went to the Maxwell home. The defendant's mother, then age 38, answered his knock. [Maxwell's father was then away from home at work. (Tr. 159; uncontradicted testimony of Maxwell's father.)] He told her he wanted to talk to William. She let him enter, checked to see if her son was in, and led Childress to the bedroom occupied by Maxwell and two younger sons. [Childress awakened Maxwell by shining a flash in his face. (Tr. 135, 186-187; uncontradicted testimony of Maxwell's mother and Maxwell.)] Childress told Maxwell he wanted to talk to him down town and asked him to dress. Childress testified that Maxwell went to the closet for clothes that were hanging there in a wrapper, and that he asked him 'to put on these other clothes here that he had on.' The latter were wet. Maxwell testified that he was told to put on the clothes he had on that night, that he went to the closet to get these, that he was then told to put on the clothes folded on the chair, that he was going to take those clothes to the cleaners, and that they were not his. [It is uncontested that Maxwell objected to wearing the clothes on the chair, which he said were wet and not his, but that Childress told him to put them on anyway. (Tr. 267; testimony of Officer Childress.)]

[Maxwell's mother testified that she was upset at this time. (Tr. 135.) At the hearing below, Childress was asked whether he had advised Maxwell or his parents (sic) that they were entitled to consult with an attorney, and replied: "No, I didn't give them any advice at all because I didn't

know whether he was being arrested or what. I just received the call over the radio to go pick him up. I didn't know what it was." (Tr. 267.)]

"Maxwell was taken to the hospital and before the victim. She at first did not identify him as her attacker but witnesses described her as visibly disturbed and shaking when he stood before her. She later said she recognized him but feared for her life if she identified him. Maxwell was taken from the hospital to the police station.

[The district court found "that when petitioner was taken into custody and incarcerated in the City Jail he was not permitted to see his parents or a lawyer." (D.C. 49.) This finding was based on petitioner's testimony that "I asked them could I use the telephone to call my—my mother, somebody to come up, a lawyer or something, and they told me I weren't going to use the phone or nothing . . ." (Tr. 189; see also Tr. 190.) The testimony is uncontradicted; Captain Crain testified only that he did not advise petitioner of his right to consult an attorney (Tr. 250), and that he made no attempt to bring petitioner before a magistrate because there was no magistrate's court until 9:00 a.m., the magistrate had traffic court at that time, and "We still had not completed our investigation." (Tr. 253.) Petitioner's incommunicado detention continued for two or three days thereafter in the jail to which he had been removed to avoid mobbing. (Tr. 192-196; uncontradicted testimony of petitioner.)]

"Both sides admit that the exact times and place of Maxwell's arrest 'is not entirely clear from the record'. It might have been at the home at about four a.m. or shortly thereafter at the hospital.

"Captain Crain, with Officer Timms, went to the Maxwell home about five a.m. to get, as he testified at the habeas

corpus hearing, 'some more clothes that we thought might help us in our investigation of this case' or, as he testified at the trial, 'I was looking for a particular object . . . I wanted what he was wearing that night'. They had no search warrant. Mrs. Maxwell permitted them to enter. [She testified below: "I did not know nothing about asking the officer for a search warrant. I didn't—I just didn't know . . ." (Tr. 146.) And, again, responsive to a question why she had not asked the officers for a warrant: "Because I didn't know—know to just quite honestly I didn't know—I was—well, I was half asleep and I just wasn't—didn't think to ask him. And I kept—my children were all at home and I just didn't think anything were wrong." (Tr. 156.)] They were in uniform. The testimony is in conflict as to whether Mrs. Maxwell was then informed of any charge against her son; Crain said he so advised her but she stated, 'He didn't say nothing about no rape case'. (The district court found she had been so advised). She directed the officers to the clothes closet. . . . [Captain Crain testified that Officer Timms checked the closet while he, Crain, talked to petitioner's mother. "Well, we—I felt sorry for her. She was in—well, she wasn't feeling any too good being—having a thing like that happen and her son being accused." (Tr. 243.)]

"Mrs. Maxwell was understandably upset at the times the officers called at her home. In the margin we quote her testimony as to both the first call[12] and the second call.[13]

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[12] ". . . it was late and I was asleep and someone knocked on the door and I woke up and I asked who was it and he said the policeman and I went to the door to let him in. He asked me did I have a son here by the name of William and I told him yes and he just come on in, he didn't have a search warrant or anything and I let him. I didn't know any better myself but I—I didn't know that he—you know, everything was all right, my children were at home and all and I just let him in."

[13] "I opened the door and I was afraid not to let them in because—you know—when they said they were police officers—well, you

> just—I've just always—I just let the police officers in because I just feel like he is for peace and all, and I just—I don't know, I didn't know anything—I never been in anything like this and I just let them in and I still didn't think anything, didn't any of those officer (sic) have any search warrant or anything, didn't show me anything like that."

Maxwell's father worked at night and was not home when the officers called."

[Asked at the hearing below whether he had told Mrs. Maxwell that she did not have to relinquish the items of clothing to him, Captain Crain replied that he did not recall. (Tr. 248.) He testified flatly that he did not mention to Mrs. Maxwell that things taken could be used in evidence against her son. (Tr. 249.)]

Capital Punishment for Rape

Petitioner's second amended petition in the district court challenged the constitutionality in their application to him of the Arkansas statutes allowing capital punishment for rape in the discretion of the jury. ARK. STAT. ANN. §§41-3403, 43-2153 (1964 Repl. Vols.), p. 7, *supra*. He contended that prosecutors and juries applied the statutes racially, in that Negroes convicted of rape upon white women were usually sentenced to death, while other classes of rape convicts usually received lesser sentences (D.C. 33); that the death sentence in his case "where life has not been forfeited is so erratic so as to deny due process of law" and equal protection of the laws (D.C. 34); and that in such a case the death sentence constituted cruel and unusual punishment (D.C. 34).[3] In support of the

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[3] The language of part (2), para. 3, of the second amendment to the petition paraphrases the language of the opinions dissenting from denial of certiorari in *Rudolph* v. *Alabama*, 375 U.S. 889 (1963) (D.C. 34), and was understood by the district court to raise an Eighth-Fourteenth Amendment issue (Tr. 10-13).

claim of racial discrimination, petitioner's counsel sought leave to take testimony of certain state officials, and to submit to the prosecutors or clerks of court of the 72 Arkansas counties not to be covered by oral testimony interrogatories or questionnaires inquiring with respect to all rape prosecutions after January 1, 1954 the name and race of the defendant, the race of the prosecutrix, the extent to which deadly force was attempted or employed in the course of the offense, and the disposition including sentence.[4] Counsel for the State expressed doubt that such information could be supplied by the prosecutors or county clerks (Tr. 312-313), and the district court thereupon declined "to go into an expedition of trying to submit it to the 72—72—75 clerks when I am convinced that they cannot furnish most of it." (Tr. 313.) However, over the strenuous objection of State's counsel (Tr. 314-317), and notwithstanding the court's disposition to believe "that the information that the petitioner is trying to obtain can't be obtained" (Tr. 317), the court did agree, as a "trial run" (Tr. 317) to hear testimony of state officials for three counties, in order to "see how fruitful it might be on a smaller basis" (Tr. 318; see Tr. 317-321). Accordingly, petitioner presented the testimony of the circuit clerk, sheriff and prosecuting attorney of Garland County (Tr. 327-356), the circuit clerk and prosecuting attorney of Pulaski County (Tr. 357-385), and the circuit

[4] The request to take depositions and to submit interrogatories and questionnaires was first made in the second amendment to the petition (D.C. 34). It was pressed at the hearing (Tr. 6-10, 14-26) and, following an initially inconclusive disposition (Tr. 25-26), renewed (Tr. 227). The district court asked counsel for the petitioner to prepare for the court's consideration the sort of interrogatories he wished to submit (Tr. 228-229); this was done (Tr. 311-312); and petitioner's request for leave to submit the interrogatories renewed again (Tr. 310-311). After the district court determined to permit testimony limited to three counties as a "trial run" (see text *infra*), petitioner's counsel put the draft questionnaire into the record to preserve his point (Tr. 321).

clerk, sheriff and prosecuting attorney of Jefferson County (Tr. 386-421). The evidence given by these officials is summarized in the margin, substantially in the words of the court of appeals.[5] It demonstrated, first, that the information sought by the petitioner was, for the most part, available: of 59 defendants charged in three counties over ten years, the race of all but four defendants was known; the race of 47 of their 63 victims was known; and dispo-

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[5] The quoted passage which follows is from the opinion of the court of appeals (C.A. 7-8). Bracketed insertions supply omitted information, derived from the testimony of the state officials at Tr. 327-421.

> "As to Garland County, for the decade beginning January 1, 1954, Maxwell's evidence was to the effect that seven whites were charged with rape (two of white women and the race of the other victims not disclosed), with four whites not prosecuted and three sentenced on reduced charges; that three Negroes were charged with rape, with one of a Negro woman not prosecuted and another of a Negro receiving a reduced sentence, and the third, the present defendant, receiving the death penalty. With respect to Pulaski County for the same decade, there were 11 whites (two twice) and 10 Negroes charged, with the race of the victim of two whites and one Negro not disclosed. Three whites received a life sentence. [Two of these had white victims; the third, a victim of undisclosed race.] One white was acquitted of rape of a Negro woman. One received a sentence on a reduced charge [victim, white], two were dismissed [victims, white], two cases remained pending [victims, white], one was not prosecuted [victim of undisclosed race], and the last was executed on a conviction for murder [victims, white; two rape charges were nol prossed]. Of the Negroes, three with white victims and two with Negro victims received life. One case was dismissed [victim of undisclosed race], one was not arrested [victim, white], two with Negro victims were sentenced on reduced charges, and one, Bailey, with a white victim, was sentenced to death. In Jefferson County eight Negroes were charged, with the cases against five dismissed [victims, one white, one Negro, three of undisclosed race], another dismissed when convicted on a murder charge [victim of undisclosed race], and two receiving sentences on reduced charges [victims, Negro]. Sixteen whites were charged. One was charged three times with respect to Negro victims and as to two of these charges received five years suspended on a guilty plea. [The remainder had white victims, except in the single case indicated *infra*.] Two others received three year sentences. One is pending, one was executed, and the rest were dismissed [one of these latter having a victim of undisclosed race.] The race of four defendants was not disclosed; three of these cases were dismissed and one is pending."

sitions of all prosecutions, including sentence, were known. Second, the evidence showed that for the counties and period covered, Negroes were charged with rape considerably less frequently than whites (by a ratio of 2:3) and were convicted of rape no more frequently than whites. Specifically, the figures are:

		Garland	Pulaski	Jefferson	Total
Number of defendants charged	White	7	11 (two twice)	16 (one thrice)	34 (two twice) (one thrice)
	Negro	3	10	8	21
	Total	10	21	28 (four unknown race)	59
Number of defendants convicted of rape	White	0	3	4 (one twice)	7 (one twice)
	Negro	1	6	0	7
	Total	1	9	4	14
Number of defendants sentenced to death	White	0	0	1	1
	Negro	1	1	0	2
	Total	1	1	1	3

On the basis of evidence in the state court transcript, it further appears, as found by the court of appeals, "that, in the 50 years since 1913, 21 men have been executed for the crime of rape [in Arkansas]; that 19 of these were Negroes and two were white; that the victims of the 19 convicted Negroes were white females; and that the victims of the two convicted whites were also white females." (C.A. 7.) The court of appeals held, as did the district court, that this was an insufficient showing of racially discriminatory application of the death penalty for rape (C.A. 8; see D.C. 60), and both courts refused to give consideration to petitioner's contention that capital punishment for rape was cruel and unusual punishment, the circuit court saying that a declaration of the unconstitutionality of the death penalty on this ground "must be for the Supreme Court in the first instance and not for

us." (C.A. 11-12; and see the district court's similar disposition at D.C. 61).

Selection of Jury Panels

In Garland County, Arkansas, petit jury lists were selected by a jury commission consisting of three commissioners, who met periodically to draw up a list of names (Tr. 47, 64). They relied primarily on their knowledge of persons in the community (Tr. 61), but also used a telephone book (Tr. 60, 77) and a list of persons who had previously served (Tr. 55, 77).

At the time of petitioner's trial, only qualified electors who had paid the poll tax were eligible to be jurors. Ark. Stat. Ann. §3-227 (1956); §39-208 (1962). The jury commissioners checked the poll tax books to determine whether the persons they had selected were qualified (Tr. 70, 80). An Arkansas statute required that poll tax books designate the race of all qualified electors. Ark. Stat. Ann. §3-118. The poll tax book for September 1961, introduced in evidence as Exhibit I, showed a small "c" after the names of Negro electors (Tr. 57, 59).

After the jury commission completed the jury list, the commission transmitted the list to the circuit clerk (Tr. 99-101). The circuit clerk for Garland County between 1955 and 1963 testified that the lists had "c's" after the names of Negroes when he received them (Tr. 48-50). The clerk also testified that he copied the lists, placing the names and racial markings into a jury book (Tr. 42).

The issue of discriminatory selection of jury panels was not raised in the state courts. Following petitioner's apprehension on November 3, 1961, two attorneys were appointed to defend him on November 28, 1961 (Ark. 2). They were discharged at their request on February 5,

1962 (Ark. 15). On January 31, 1962, Attorney Christopher C. Mercer was hired to defend petitioner (Ark. 13). Mercer discussed many aspects of the case with petitioner, including the jury panel, but he did not discuss with petitioner whether to raise the issue of racial discrimination in the jury selection process (Tr. 298, 305-306).

Jurisdiction of the District Court

Jurisdiction of the United States District Court for the Eastern District of Arkansas was based on 28 U.S.C. §2241.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to determine the legality of search of petitioner's home without a warrant, in petitioner's absence, under purported consent of his mother.

Two issues arising out of the search of petitioner's home and seizure of his clothing without a warrant call for the exercise of this Court's certiorari jurisdiction. The State of Arkansas seeks to support the search and seizure under consent given by petitioner's mother in his absence following his arrest. Petitioner contends, first that his mother's acquiescence in the search and seizure was not voluntary and understanding; second, that her acquiescence could in no event effect a waiver of petitioner's Fourth-Fourteenth Amendment rights. The district court rejected petitioner's contentions on one theory and the court of appeals on another, Judge Ridge dissenting. On this foundation, relief against the death penalty has been denied.

The facts surrounding the search and seizure issues have been set forth at pp. 8-13, *supra*. Except in a minor point, they are uncontested. A white police officer went to the home of petitioner's Negro family in Hot Springs, Arkansas, shortly before 4:00 a.m. Petitioner's father was away at work; petitioner's 38 year old mother, petitioner, and two brothers were at home asleep. The officer woke petitioner's mother by knocking at the door. She asked who was there; he said it was a policeman; she let him in. "He asked me did I have a son here by the name of William and I told him yes and he just come on in, he didn't have a search warrant or anything and I let him in. I didn't know any better myself, but I—I didn't know that he—you know, everything was all right, my children were at home and all and I just let him in." P. 12, *supra*. Once inside, the officer awakened petitioner by shining a flashlight in his face and told him to get dressed. He refused to permit petitioner to put on the clothing chosen by petitioner, ordered him to put on other clothing. Petitioner was told that he was being taken to the police station, that the police wanted to talk to him. He was not told why. Petitioner's mother was not told that she could call an attorney; she was not told the charges against petitioner; the officer "didn't give them any advice at all because I didn't know whether he was being arrested or what." Pp. 10-11, *supra*.

Petitioner was taken to a hospital for identification by a white rape victim, then to the police station where he was held incommunicado and refused permission to phone a lawyer or his parents. One hour later, two white police officers returned to petitioner's home. Petitioner was then incarcerated; it was about 5:00 a.m.; and although the officers went for the specific purpose of obtaining clothing which would incriminate petitioner, they sought no search warrant. Petitioner's father was still not home. They

asked petitioner's mother if they could come in take some of petitioner's clothing. She let them in and directed them to the closet. "I opened the door and I was afraid not to let them in because—you know—when they said they were police officers—well, you just—I've just always—I just let the police officers in because I feel like he is for peace and all, and I just—I don't know, I didn't know anything—I never been in anything like this and I just let them in and I still didn't think anything, didn't any of those officer have a search warrant or anything, didn't show me anything like that." P. 12, *supra*. "I did not know nothing about asking the officer for a search warrant." P. 12, *supra*. Petitioner's mother testified below that the officers had not told her the charges against her son. Crain contradicted this, said that he told her the charges and—as might be expected of a Negro mother whose son is charged with rape of a white woman in Arkansas—"well, she wasn't feeling any too good being—having a thing like that happen and her son being accused." P. 12, *supra*. In any event, the mother's testimony that she did not know the officers needed a warrant to make the search was uncontested. Captain Crain said he did not recall that he told Mrs. Maxwell she need not relinquish the clothing, and testified flatly that he did not advise her the clothing could be used against her son. While he was talking to her, his companion officer took the coat which provided a damaging link in the evidence later used to support petitioner's conviction and sentence of death.

On this record, the district court found that it was the mother's "free and voluntary choice to permit the police to enter and search the closet." (D.C. 49.) "However, the propriety of the search and seizure need not rest solely upon the consent given by petitioner's mother. The lawfulness of this search and seizure is based upon a consi-

deration of all the facts and circumstances. . . . [T]here was nothing unfair, unreasonable or oppressive in the conduct of the police in the performance of the search and seizure. . . ." (D.C. 49.) Apparently recognizing the untenability of this latter ground,[6] the court of appeals

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[6] Although language in some of this Court's cases has suggested that the test of validity of a search and seizure under the Fourth Amendment is general reasonableness, e.g., *United States* v. *Rabinowitz,* 339 U.S. 56 (1950), the Court has never sustained the warrantless search of a dwelling not incident to arrest unless validated by consent. And, at least since 1950, the Court's decisions have made clear that a warrantless search is *eo ipso* unreasonable and unconstitutional, e.g., *United States* v. *Jeffers,* 342 U.S. 48 (1951); *Chapman* v. *United States,* 365 U.S. 610 (1961), unless "'. . . brought . . . within one of the exceptions to the rule that a search must rest upon a search warrant.'" *Stoner* v. *California,* 376 U.S. 483, 486 (1964), quoting *Rios* v. *United States,* 364 U.S. 253, 261 (1960). See also *Jones* v. *United States,* 357 U.S. 493 (1958). Those exceptions are specific. There are special rules relating to search of moving vehicles, stemming from *Carroll* v. *United States,* 267 U.S. 132 (1925), not involved here. There is the doctrine allowing search incident to a valid arrest, *United States* v. *Rabinowitz, supra,* which cannot validate the present search. *Preston* v. *United States,* 376 U.S. 364 (1964). Cases involving "abandoned property," see *Abel* v. *United States,* 362 U.S. 217 (1960), fall outside the scope of "persons, houses, papers, and effects" in which the Fourth Amendment guarantees the citizen against unreasonable search and seizure. See *Hester* v. *United States,* 265 U.S. 57 (1924). But petitioner's home and clothing are clearly within the protection of the Amendment and, inside that sphere, the Court's decisions allow only the exceptions enumerated above to the warrant requirement. Dictum in a few cases also suggests that a warrant may be foregone if compelling necessity to seize easily transported or destroyed contraband or instruments of crime makes resort to a magistrate impossible. *Johnson* v. *United States,* 333 U.S. 10 (1948); *Chapman* v. *United States, supra.* But no such necessity has been found by any of the courts below; nor could it have been on this record. Hence, absent consent, the search and seizure here were unconstitutional.

However, even were the question under the Fourth Amendment one—as the district court believed—of general reasonableness, fairness and unoppressiveness, it would be difficult to imagine a more unreasonable, unfair and oppressive search. Having petitioner in their custody and seeking items of his clothing to incriminate him, the police did not ask his permission to seize them. Instead, they detained him incommunicado, refused him leave to phone a lawyer or the persons at his home. Then, without a warrant, at 5:00 a.m., they went to petitioner's dwelling and intruded on his mother for the second time that night. Uniformed, and without explaining that she had a right to refuse them entry, they asked permission to come in, which she—unknowing—granted.

rested the validity of the search solely upon its finding of consent. (C.A. 19, 23.)

A. *The search and seizure issues are important, requiring consideration by this Court on certiorari.*

The two issues thus presented—the requisites for valid waiver of the requirement of a search warrant, and the effect of waiver by one cotenant upon the Fourth-Fourteenth Amendment rights of another—clearly present "an important question of federal law which has not been, but should be, settled by this court." Supreme Court Rule 19(1)(b). The circuit courts are in conflict on both issues.

(1) No issue under the Fourth Amendment is more frequently litigated than the validity of consent to a warrantless search.[7] Nor is any issue more critical to the Amendment's effective protection, for where consent is found all of the scrupulous safeguards preserved by this Court's decisions as limitations upon official intrusion are nullified. Not only is no warrant required, but—the protection of the Amendment being deemed waived—searches

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[7] In addition to the cases collected in the following pages, see, e.g., these recent federal circuit court decisions: *Mosco* v. *United States*, 301 F.2d 180 (9th Cir. 1962); *United States* v. *Smith*, 308 F.2d 657 (2d Cir. 1962); *Villano* v. *United States*, 310 F.2d 680 (10th Cir. 1962); *Frye* v. *United States*, 315 F.2d 491 (9th Cir. 1963); *Robinson* v. *United States*, 325 F.2d 880 (5th Cir. 1964); *Gatlin* v. *United States*, 326 F.2d 666 (D.C. Cir. 1963); *United States* v. *Horton*, 328 F.2d 132 (3d Cir. 1964); *United States* v. *Hilbrich*, 341 F.2d 555 (7th Cir. 1965). Litigation of the issue in the State courts is not less frequent, see e.g., the California cases collected in *Note*, 51 CALIF. L. REV. 1010 (1963); *State* v. *Hanna*, 150 Conn. 457, 191 A.2d 124 (1963); *State* v. *Scrotsky*, 39 N.J. 410, 189 A.2d 23 (1963); *Commonwealth* v. *Wright*, 411 Pa. 81, 190 A.2d 709 (1963); *Holt* v. *State*, 17 Wis.2d 468, 117 N.W.2d 626 (1962), and the importance of the question has made it the subject of much recent law review comment, e.g., *Comment*, 69 DICK. L. REV. 69 (1964); *Comment*, [1964] U. ILL. L. FORUM 653; *Note*, 113 U. PA. L. REV. 260 (1964); *Note*, [1964] WIS. L. REV. 119. For earlier state cases, see *Annot.*, 31 A.L.R.2d 1078 (1953).

and seizures may proceed without probable cause[8] and unfettered of any other constraint of reasonableness.[9] Little wonder that "consent" is the policeman's preferred authority to search; that in 1954 a federal circuit court remarked upon "this increasing practice of federal officers searching a home without a warrant on the theory of consent . . .";[10] that the response of more than one state police official following *Mapp* v. *Ohio*, 367 U.S. 643 (1961), was, in substance: "We are going to get consent to search forms similar to the ones used by the F.B.I." [11]

(2) Nothwithstanding frequent litigation, the decisions of the lower courts are in irresolvable conflict and confusion. All courts agree, of course, that consent must be "voluntary" to be effective. But, as the Ninth Circuit has recently said, "In other contexts the word voluntary might connote anything from enthusiastic action taken on one's own initiative, at one extreme, to grudging action just short of being compelled by what the law would regard as duress, at the other." *Martinez* v. *United States*, 333 F.2d 405, 407 (9th Cir. 1964). Far from giving meaning to the concept of voluntariness as respects consent to a warrantless search, the circuit courts of appeals have more or less explicitly declared the concept not susceptible of reasoned analysis. "Each case necessarily depends upon its own facts. The mere fact that a particular panel of this court may feel that another panel, in a prior decision, was mistaken in holding that a finding was 'clearly erroneous' is not a basis for convening the court in bank and overruling the prior decision." *United States* v. *Page*, 302

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[8] See *Rios* v. *United States*, 364 U.S. 253 (1960).

[9] See, *e.g.*, *Davis* v. *United States*, 327 F.2d 301 (9th Cir. 1964).

[10] *United States* v. *Arrington*, 215 F.2d 630, 637 (7th Cir. 1954).

[11] See the Appendix to *Weinstein, Local Responsibility for Improvement of Search and Seizure Practices*, 34 ROCKY MT. L. REV. 150, 176, 177 (1962). For similar responses, see *id.* at 178-179.

F.2d 81, 86 (9th Cir. 1962), distinguishing *Channel* v. *United States*, 285 F.2d 217 (9th Cir. 1960). See also *Hart* v. *United States*, 316 F.2d 916, 920 (5th Cir. 1963); *United States* v. *Ziemer*, 291 F.2d 100, 103 (7th Cir. 1961); *Burge* v. *United States*, 332 F.2d 171, 173 (8th Cir. 1964); *Tatum* v. *United States*, 321 F.2d 219, 220 (9th Cir. 1963). Expectably, the result of thus calling consent a "question of fact," without attempting to formulate any general principles of law which tell the trier what facts he is to inquire about and what he is to do if he finds one set of facts rather than another, has been serious inter-circuit conflict.[12] In *United States* v. *Roberts*, 179 F. Supp. 478 (D.D.C. 1959), Judge Youngdahl found a mother's consent involuntary on facts virtually indentical with those of the present case. This sort of fortuitous result may be blinked away, under the prevailing lore of the circuit courts, by saying that two district judges took different views on the same question of fact. But when the cases are closely compared, it becomes apparent that what controlled the differing results were differing views on an unarticulated question of law: whether one who does not know and is not told that officers cannot make a search without a warrant should be held to waive the warrant requirement by agreeing to a request for leave to search. Judge Young-

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[12] Compare *Pekar* v. *United States*, 315 F.2d 319 (5th Cir. 1963), with *United States* v. *Ziemer*, 291 F.2d 100 (7th Cir. 1961). Compare *Higgins* v. *United States*, 209 F.2d 819 (D.C. Cir. 1954), with *United States* v. *MacLeod*, 207 F.2d 853 (7th Cir. 1953). Compare *Reed* v. *Rhay*, 323 F.2d 498 (9th Cir. 1963), with *United States* v. *Evans*, 194 F. Supp. 90 (D.D.C. 1961). Compare *United States* v. *Haas*, 106 F. Supp. 295, 109 F. Supp. 433 (W.D. Pa. 1952), with *United States* v. *Minor*, 117 F. Supp. 697 (E.D. Okla. 1953). Underlying these inconsistent results are large inconsistencies of attitude. Compare the inhospitality toward a finding of consent by the Court of Appeals for the District of Columbia Circuit, e.g., *Judd* v. *United States*, 190 F.2d 649, 651-652 (D.C. Cir. 1951), with the hospitality toward such a finding by the Court of Appeals for the Ninth Circuit, e.g., *Martinez* v. *United States*, 333 F.2d 405, 407 (9th Cir. 1964).

dahl assumed that the answer to this question was negative;[13] District Judge Young below assumed that it was positive; the Court of Appeals below affirmed without discussing the question; and, indeed, the question has not been explicitly framed in any circuit court decision.[14] Surely this question is one which permits and rationally demands an answer in law; but until this Court grants review to frame and decide such subordinate questions underlying the issue of consent, circuit court decisions in cases involving life or death will continue to be made lawlessly.

This Court has not decided a case involving the voluntariness of consent to search and seizure in almost twenty years. The few decisions prior to that time do not squarely address the questions arising in case after case today.[15]

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[13] In *Roberts*, defendant's mother had been told by the searching officers that they were not permitted to search without a warrant unless she consented. But Judge Youngdahl found: "It is difficult to believe that this particular woman understood the significance of what the officers told her; it is quite implausible to believe she was aware a search warrant was a prerequisite to a valid search." 179 F. Supp. at 479. Therefore, Judge Youngdahl found her consent ineffective. In the present case, Judge Young found consent by petitioner's mother effective on a record which makes clear that she did not know and was not told that a search warrant was a prerequisite to a valid search.

[14] In a number of cases where effective consent has been found, it appears the person consenting was told that, unless he consented, a search could not be made without a warrant. *United States* v. *Heine*, 149 F.2d 485 (2d Cir. 1945); *United States* v. *Rivera*, 321 F.2d 704 (2d Cir. 1963); *United States* v. *MacLeod*, 207 F.2d 853 (7th Cir. 1953); *Burge* v. *United States*, 332 F.2d 171 (8th Cir. 1964); *United States* v. *Haas*, 106 F. Supp. 295, 109 F. Supp. 443 (W.D. Pa. 1952). But consent has also been found where no such warning was given, e.g., *McDonald* v. *United States*, 307 F.2d 272 (10th Cir. 1962) (alternative ground), and petitioner has found no circuit decisions squarely facing the question.

[15] *Gouled* v. *United States*, 255 U.S. 298 (1921), where consent was procured by misrepresentation, and *Johnson* v. *United States*, 333 U.S. 10 (1948), where entry "was granted in submission to authority," *id.* at 13, have been viewed as extreme cases. *United States* v. *Mitchell*, 322 U.S. 65 (1944), considers only the effect of the *McNabb* rule on consent to search. *McDonald* v. *United States*, 335 U.S. 451 (1948), does not distinctly address the question of voluntariness of consent. The *Amos* case is discussed at p. 31, *infra*.

Worse still, the Court's most extended discussion of the consent principle came in the "public documents" cases, *Davis* v. *United States*, 328 U.S. 582 (1946), and *Zap* v. *United States*, 328 U.S. 624 (1946); and notwithstanding the admonition that "Where officers seek to inspect public documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where private papers are sought," [16] the courts of appeals have relied on *Davis* and *Zap* in sustaining searches for entirely private items.[17] The circuit court below thus erroneously relied on *Davis*. (C.A. 20.) Petitioner respectfully submits the question is ripe for renewed consideration by the Court.

(3) Similarly, the question under what circumstances, if any, consent to search given by one cotenant can affect the Fourth Amendment rights of another, urgently demands the attention of the Court. Frequently arising in cases where, as here, the voluntariness of the consent is also in issue,[18] the point is one upon which the "federal court decisions . . . are not in accord." *Commonwealth* v. *Wright*, 411 Pa. 81, 85, 190 A.2d 709, 711 (1963).[19] The Eighth Circuit itself, in an opinion upon which the decision below relies, has admitted that "Without the benefit of a Supreme Court clarification of the issue, those federal

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[16] *Davis* v. *United States*, *supra*, 328 U.S. at 593.

[17] See, e.g., *Rees* v. *Peyton*, 341 F.2d 859 (4th Cir. 1965), relying on *Zap*.

[18] See, e.g., *United States* v. *Sferas*, 210 F.2d 69 (7th Cir. 1954); *Waldron* v. *United States*, 219 F.2d 37 (D.C. Cir. 1955); *Williams* v. *United States*, 263 F.2d 487 (D.C. Cir. 1959); *Davis* v. *United States*, 327 F.2d 301 (9th Cir. 1964); *United States* v. *Goodman*, 190 F. Supp. 847 (N.D. Ill. 1961); *United States* v. *Block*, 202 F. Supp. 705 (S.D.N.Y. 1962); *United States ex rel. McKenna* v. *Myers*, 232 F. 65 (E.D. Pa. 1964).

[19] *Wright* itself is not in accord with *United States ex rel. Stacey* v. *Pate*, 324 F.2d 934 (7th Cir. 1963), decided six months later.

courts which have considered the question have taken divergent positions." *Roberts* v. *United States,* 332 F.2d 892, 895 (8th Cir. 1964).[20] Early decisions held that the cotenant's consent could not validate a warrantless search against complaint by a person having a possessory interest in the premises searched.[21] Most of the subsequent cases appearing to give effect to such consent can be explained on various narrow grounds. Where the consenting and complaining parties were co-conspirators as well as cotenants and consent was given for the purpose of beguiling the searching officers, the result rested simply on the ordinary concepts of agency applicable among conspirators.[22] In a number of cases, the complaining party had no possessory interest whatever in the place searched; if given standing to complain at all,[23] it was as a means for vindicating by the exclusionary sanction the rights of the possessor;[24] and a finding of consent by the possessor ended the complaining party's grievance, which had never been bottomed on infringement of his own protected in-

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[20] The Eighth Circuit had earlier reserved the question. *Foster* v. *United States,* 281 F.2d 310 (8th Cir. 1960).

[21] *Cofer* v. *United States,* 37 F.2d 677 (5th Cir. 1930) (alternative ground); *United States* v. *Rykowski,* 267 Fed. 866 (S.D. Ohio 1920) (alternative ground); *United States* v. *Ruffner,* 51 F.2d 579 (D. Md. 1931).

[22] See *United States* v. *Pugliese,* 153 F.2d 497 (2d Cir. 1945) (alternative ground); *United States* v. *Sferas,* 210 F.2d 69 (7th Cir. 1954); *United States* v. *Sergio,* 21 F. Supp. 553 (E.D.N.Y. 1937).

[23] In some of the cases in which the courts advert to consent by a party other than the one complaining of a search, the opinions make relatively clear that they are doing so for the purpose of stressing that the consenting party, but not the complaining party, had the sort of interest in the searched premises which the Fourth Amendment protects. See *United States* v. *Walker,* 190 F.2d 481 (2d Cir. 1951), 197 F.2d 287 (2d Cir. 1952); *Calhoun* v. *United States,* 172 F.2d 457 (5th Cir. 1949); *United States ex rel. Puntari* v. *Maroney,* 220 F. Supp. 801 (W.D. Pa. 1963).

[24] See *McDonald* v. *United States,* 335 U.S. 451 (1948).

terests.[25] Cases involving searches and seizures of movables upon consent of the person to whom their owner had entrusted them stand on different principles: warrantless searches of movables being lawful if based upon probable cause,[26] consent in such cases is pertinent only because the information conveyed in the consenting party's communication to the police gives the police reasonable ground to believe items subject to seizure are concealed within the movable.[27] Yet in a few recent decisions, among which petitioner's is the most extreme, courts have thought to find within these earlier cases a general principle which the cases will not support, that one cotenant in a dwelling may effectively waive another's constitutional immunity against warrantless search.[28]

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[25] *Woodard* v. *United States*, 254 F.2d 312 (D.C. Cir. 1958) (complaining party is transient guest in consenting party's dwelling); *Fredricksen* v. *United States*, 266 F.2d 463 (D.C. Cir. 1959) (same); *Rees* v. *Peyton*, 341 F.2d 859 (4th Cir. 1965) (same); *Calhoun* v. *United States*, 172 F.2d 457 (5th Cir. 1949) (same); *Burge* v. *United States*, 342 F.2d 408 (9th Cir. 1965) (same). See also *Cutting* v. *United States*, 169 F.2d 951 (9th Cir. 1948); *Von Eichelberger* v. *United States*, 252 F.2d 184 (9th Cir. 1958); *Wion* v. *United States*, 325 F.2d 420 (10th Cir. 1963). The principle is apparent in cases sustaining against an absentee landlord's complaint searches consented to by his tenant in possession. See *Driskill* v. *United States*, 281 Fed. 146 (9th Cir. 1922); *Reszutek* v. *United States*, 147 F.2d 142 (2d Cir. 1945); *Fisher* v. *United States*, 324 F.2d 775 (8th Cir. 1963).

[26] *Carroll* v. *United States*, 267 U.S. 132 (1925); *United States* v. *Boston*, 330 F.2d 937 (2d Cir. 1964) (alternative ground); *Romero* v. *United States*, 318 F.2d 530 (5th Cir. 1963) (alternative ground); *United States* v. *Zimmerman*, 326 F.2d 1 (7th Cir. 1963).

[27] *Compare Sartain* v. *United States*, 303 F.2d 859 (9th Cir. 1962), with *Holzhey* v. *United States*, 223 F.2d 823 (5th Cir. 1955), where the movable was within a dwelling and consent of a cotenant was held ineffective. See also *United States* v. *Eldridge*, 302 F.2d 463 (4th Cir. 1962). Cases involving entry into a dwelling, upon consent of one cotenant, to arrest another, have been thought to involve the same principle, since arrest may be made on probable cause without a warrant. See *Teasley* v. *United States*, 292 F.2d 460 (9th Cir. 1961).

[28] *Roberts* v. *United States*, 332 F.2d 892 (8th Cir. 1964); *Davis* v. *United States*, 327 F.2d 301 (9th Cir. 1964); *United States ex rel. McKenna* v. *Myers*, 232 F. Supp. 65 (E.D. Pa. 1964). These cases, like the

No such broad doctrine is sanctioned by this Court's decisions. But neither has the Court condemned unequivocally a finding that one cotenant's Fourth Amendment rights may be waived by another. The question was reserved in *Amos* v. *United States,* 255 U.S. 313 (1921), and has not since been considered by the Court. Cases holding that a landlord may not effectively consent to search of his tenant's premises, see *Lustig* v. *United States,* 338 U.S. 74 (1949); *United States* v. *Jeffers,* 342 U.S. 48 (1951); *Chapman* v. *United States,* 365 U.S. 610 (1961), were thought distinguishable by the courts below, which read the Court's recent statement in *Stoner* v. *California,* 376 U.S. 483, 488 (1964), that "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority,'" as limited to such cases. The issue is squarely presented in the present case, and demands decision by this Court.

B. *The decision below is wrong and sends petitioner to death in violation of his Fourth-Fourteenth Amendment rights.*

(1) Judged by appropriate standards, the consent to search given by petitioner's mother was not voluntary and understanding. While this Court has never had occasion to confront the question squarely, its opinion in *John-*

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decision below (see C.A. 20) purport to rest upon the cases cited in notes 17-22 *supra.* The *Roberts* holding, however, did not involve a seizure of the complaining party's personal effects, and in *Davis* the trial court found that the purpose of the officers making entry was to talk to the occupant, not to search. *McKenna* is quite similar to the instant case.

In *Stein* v. *United States,* 166 F.2d 851 (9th Cir. 1948), it was indeed held that a commonlaw wife could validate by her consent the search of the dwelling which she shared with her husband. *Waldron* v. *United States,* 219 F.2d 37 (D.C. Cir. 1955) (alternative ground), is to the contrary, unless the cases are reconcilable on the ground that the husband in *Stein* had closed up the house and moved out prior to the search.

son v. *United States*, 333 U.S. 10, 13 (1948), plainly takes the view that in order to be effective a consent to search or seizure must be "an understanding and intentional waiver of a constitutional right." This is the concept of waiver ordinarily applicable to fundamental guarantees. See *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). It is not enough that the individual acquiesces in a method of procedure against which the Constitution gives protection; he or she must know of the protection which the Constitution gives and intentionally abandon or relinquish it. On the present record it is uncontested that petitioner's mother neither knew nor was told that the officers needed a warrant to conduct a lawful search. For this reason alone, her consent was ineffective. The point is the stronger because, one hour before she allowed the incriminating search, she had seen a police officer who arrested her son without a warrant compel him to put on clothes which he did not choose to wear. Nothing in the subsequent conduct of the officers dispelled the implication that their power to seize items of clothing without a warrant was limitless.

Other considerations too compel the conclusion that this consent failed to meet constitutional standards for waiver. The test of voluntariness of a consent to search and seizure should be more stringent than that for voluntariness of a confession, for while it is plain that some questioning is essential to police investigation, only the convenience of police officers requires procurement of consent to search in lieu of a warrant. There is legal process consistent with the Fourth Amendment for attaining the officer's end, but he chooses not to use it. Here, it was more convenient to the Hot Springs police to disturb a Negro woman at 5:00 a.m. than to disturb a magistrate. Following one hour after arrest of her son in their home—a circumstance

calculated to distract her, and which Captain Crain observed had in fact distracted her—two white, uniformed officers asked admittance for the purpose of a warrantless search and it was granted. These conditions constitute the sort of "implied coercion" found in *Amos* v. *United States*, 255 U.S. 313, 317 (1921),[29]—coercion to be condemned becaused of its almost inevitable tendency to produce an undeliberated and cowed consent. See *Elmore* v. *Commonwealth*, 282 Ky. 443, 138 S.W.2d 956 (1940), relied on by Judge Ridge in his dissent below. Where such conditions are found, judicial speculation that petitioner's mother did not succumb to their overbearing force is altogether impermissible.

(2) Even assuming the mother's consent voluntary and understanding, it could not effectively waive petitioner's constitutional rights. The officers went to petitioner's home for the specific purpose of seizing items of clothing which would incriminate *him*. He was available to them; they had him in custody at the time. But no effort was made, after due warning of his constitutional rights, to ask *his* permission for the search. Whatever may be the case when the individual at whom a search is aimed cannot be found by the police, only callous disregard for the Fourth Amendment can justify allowing the police to bypass a man whom they hold confined and seek a waiver of his rights at the hands of another. "It is important to bear

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[29] The facts in *Amos* upon which this Court found consent ineffective were as follows: "Coleman and Rector . . . as deputy collectors of Internal Revenue . . . went to defendant's home and, not finding him there, but finding a woman who said she was his wife, told her they were revenue officers and had come to search the premises 'for violations of the revenue law'; . . . thereupon the woman opened the store and the [officers] . . . entered, and in a barrel of peas found a bottle containing not quite a half-pint of illicitly distilled whiskey . . .; and . . . they then went into the home of the defendant and on searching found two bottles under the quilt on the bed, one of which contained a full quart, and the other a little over a quart of illicitly distilled whiskey." 255 U.S. at 315.

in mind that it was the petitioner's constitutional right which was at stake here . . ." *Stoner* v. *California*, 376 U.S. 483, 487 (1964). And it would be callousness compounded to allow such bypassing where, as here, the police are detaining their prisoner incommunicado, preventing him, in flagrant violation of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), from calling upon a lawyer for his protection or from phoning the very persons at home whose consent to search the police are then actively seeking.

Moreover, any rule which would permit one cotenant, without actual authority from another, to waive the latter's Fourth Amendment rights ignores the intimate relationship between the Fourth and Fifth Amendments which this Court has long remarked. *Boyd* v. *United States*, 116 U.S. 616, 633-635 (1886); see *Mapp* v. *Ohio*, 367 U.S. 643, 657 (1961). Whatever its modern extensions, the Fourth Amendment has at its core a prohibition of warrantless official entries designed to secure incriminating evidence against a criminal suspect. *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (C.P. 1765); *Frank* v. *Maryland*, 359 U.S. 360, 365 (1959). Entries of this sort are dissimilar to other entries, both by reason of their practical consequences and because the historical experience embodied in the Fourth Amendment has singled them out as a source of especial concern. See *United States* v. *Blok*, 188 F.2d 1019 (D.C. Cir. 1951). And so it does not follow that, because petitioner's mother might have admitted a friend, relative or the exterminator to petitioner's bedroom closet, she could consistently with the Fourth Amendment admit a policeman in quest for evidence of petitioner's guilt. Of actual authority to permit this incriminating search, petitioner's mother had none. Petitioner believes this Court spoke generally, and not with reference only to the landlord-tenant relationship, when it said in *Stoner*

v. *California, supra*: "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" 376 U.S. at 488. Nothing more than an unrealistic finding of apparent authority supports the death sentence on this record.

II.

Certiorari should be granted to determine whether Arkansas' death penalty for rape is unconstitutional because (A) an unrebutted prima facie showing has been made of its racial application, in violation of the equal protection clause of the Fourteenth Amendment, or (B) its allowance to the jury of unfettered discretion to impose capital punishment for all offenses of rape, in the absence of aggravating circumstances, permits cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

A. *Petitioner's Equal Protection contention, wrongly rejected below presents an important question for consideration by this Court on certiorari.*

Seventeen American States retain capital punishment for rape. Nevada permits imposition of the penalty only if the offense is committed with extreme violence and great bodily injury to the victim;[30] the remaining sixteen jurisdictions—which allow their juries absolute discretion to punish any rape with death—are all southern or border states.[31] The federal jurisdiction and the District of Colum-

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[30] Nev. Rev. Stat. §200.360 (1963). See also §200.400 (aggravated assault with intent to rape).

[31] The following sections punish rape or carnal knowledge unless otherwise specified. Ala. Code §§14-395, 14-397, 14-398 (Recomp. Vol. 1958); Ark. Stat. Ann. §§41-3403, 43-2153 (1964 Repl. Vols.); see also §41-3405 (administering potion with intent to rape); §41-3411 (forcing marriage); Fla. Stat. Ann. §794.01 (1964 Cum. Supp.); Ga. Code Ann. §§26-1302,

bia, with its own strong southern traditions, also allow the death penalty for rape.[32]

Between 1930 and 1962, the year in which petitioner was sentenced to die, 446 persons were executed for rape in the United States. Of these, 399 were Negroes, 45 were whites, and 2 were Indians. All were executed in Southern or border States or the District. The percentages—89.5% Negro, 10.1% white—are revealing when compared to similar racial percentages of persons executed during the same years for murder and other capital offenses. Of the total number of persons executed in the United States, 1930-1962, for murder, 49.1% were Negro; 49.7% were white. For other capital offenses, 45.6% were Negro; 54.4% were white. Louisiana, Mississippi, Oklahoma, Virginia, West Virginia and the District of Columbia never executed a white man for rape during these years. Together they executed 66 Negroes. Arkansas, Delaware, Florida, Kentucky and Missouri each executed one white man for rape between 1930 and 1962. Together they executed 71 Negroes. Putting aside Texas (which executed 13 whites and 66 Negroes), sixteen Southern and border States and the District of Columbia between 1930 and 1962 executed 30 whites and 333 Negroes for rape: a ratio

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26-1304 (1963 Cum. Supp.); Ky. Rev. Stat. Ann. §435.090 (1963); La. Rev. Stat. Ann. §14:42 (1950) (called aggravated rape but slight force is sufficient to constitute offense; also includes carnal knowledge); Md. Ann. Code, art. 27, §§461, 462 (1957); see also art. 27, §12 (assault with intent to rape); Miss. Code Ann. §2358 (Recomp. Vol. 1956); Vernon's Mo. Stat. Ann. §559.260 (1953); N.C. Gen. Stat. §14-21 (Recomp. Vol. 1953); Okla. Stat. Ann., tit. 21, §§1111, 1114, 1115 (1958); S.C. Code Ann. §§16-72, 16-80 (1962) (includes assault with attempt to rape as well as rape and carnal knowledge); Tenn. Code Ann. §§39-3702, 39-3703, 39-3704, 39-3705 (1955); Tex. Pen. Code Ann., arts. 1183, 1189 (1961); Va. Code Ann. §18.1-44 (Repl. Vol. 1960); see also §18.1-16 (attempted rape).

[32] 18 U.S.C. §2031 (1964); 10 U.S.C. §920 (1964); D.C. Code Ann. §22-2801 (1961).

of better than one to eleven. Clearly, unless the incidence of rape by Negroes is many times that of rape by whites, capital punishment for rape survives in the twentieth century principally as an instrument of racial repression.[33]

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[33] The figures in this paragraph are taken from UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, No. 32; *Executions, 1962* (April 1963). Table 1 thereof shows the following executions under civil authority in the United States between 1930 and 1962:

MURDER

	Total	*White*	*Negro*	*Other*
Number	3298	1640	1619	39
Per Cent	100.0	49.7	49.1	1.2

RAPE

	Total	*White*	*Negro*	*Other*
Number	446	45	399	2
Per Cent	100.0	10.1	89.5	.04

OTHER OFFENSES

	Total	*White*	*Negro*	*Other*
Number	68	37	31	0
Per Cent	100.0	54.4	45.6	0.0

Table 2 thereof shows the following executions under civil authority in the United States between 1930 and 1962, for the offense of rape, by State:

	White	Negro	Other
Federal	2	0	0
Alabama	2	20	0
Arkansas	1	17	0
Delaware	1	3	0
District of Columbia	0	2	0
Florida	1	35	0
Georgia	3	58	0
Kentucky	1	9	0
Louisiana	0	17	0
Maryland	6	18	0
Mississippi	0	21	0
Missouri	1	7	0
North Carolina	4	41	2
Oklahoma	0	4	0
South Carolina	5	37	0
Tennessee	5	22	0
Texas	13	66	0
Virginia	0	21	0
West Virginia	0	1	0
	45	399	2

If this be so—if the racially unequal results in these States derive from any cause which takes account of race as a factor in meting out punishment—a Negro punished by death is denied, in the most radical sense, the equal protection of the laws.[34] One of the cardinal purposes of the Fourteenth Amendment was the elimination of racially discriminatory criminal sentencing. The First Civil Rights Act of April 9, 1866, ch. 31, §1, 14 Stat. 27, declared the Negroes citizens of the United States and guaranteed that "such citizens, of every race and color, . . . shall be subject to like punishment, pains, and penalties [as white citizens], and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." The Fourteenth Amendment was designed to elevate the Civil Rights Act of 1866 to constitutional stature. See, e.g., *tenBroek, Thirteenth Amendment to the Constitution of the United States*, 39 CALIF. L. REV. 171 (1951); *Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5 (1949). The Enforcement Act of May 31, 1870, ch. 114, §§16, 18, 16 Stat. 140, 144, implemented the Amendment by reenacting the 1866 act and extending its protection to all persons. This explicit statutory prohibition of racially discriminatory sen-

[34] The contention that racially discriminatory application of the death penalty in rape cases denies equal protection has been raised in a number of cases now pending in state and federal courts. See, e.g., *Mitchell* v. *Stephens*, 232 F. Supp. 497, 507 (E.D. Ark. 1964), appeal pending; *Moorer* v. *MacDougall*, U.S. Dist. Ct., E.D.S.C., No. AC-1583, petition for writ of habeas corpus pending; *Aaron* v. *Holman*, U.S. Dist. Ct., M.D. Ala., C.A. No. 2170-N, proceedings on petition for writ of habeas corpus stayed pending exhaustion of state remedies July 2, 1965; *Swain* v. *Alabama*, Ala. Sup. Ct., 7 Div. No. 699, petition for leave to file petition for writ of error *coram nobis* denied June 25, 1965; *Alabama* v. *Billingsley*, Cir. Ct. Etowah County, No. 1159, motion for new trial and motion for reduction of sentence pending; *Craig* v. *Florida*, Sup. Ct. Fla., No. 34,101, appeal from denial of motion for reduction of sentence pending; *Louisiana ex rel. Scott* v. *Hanchey*, 20th Jud. Dist. Ct., Parish of West Feliciana, petition for habeas corpus pending.

tencing survives today as Rev. Stat. §1977 (1875), 42 U.S.C. §1981 (1964).

For purposes of the prohibition, it is of course immaterial whether a State writes on the face of its statute books: "Rape shall be punishable by imprisonment . . ., except that rape by a Negro of a white woman, or any other aggravated and atrocious rape, shall be punishable by death by electrocution," or whether the State's juries read a facially color-blind statute to draw the same racial line. Discriminatory application of a statute fair upon its face is more difficult to prove, but no less violates the State's obligation to afford all persons within its jurisdiction the equal protection of the laws. E.g., *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (alternative ground); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Hamilton* v. *Alabama*, 376 U.S. 650 (1964) (per curiam).[35] And it does not matter that the discrimination is worked by a number of separate juries functioning independently of each other, rather than by a single state official. However it may divide responsibility internally, the *State* is federally obligated to assure the equal application of its laws.[36] This Court has long sustained claims of discriminatory jury exclusion

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[35] It is also immaterial whether a State imposes different penalties for classes of cases defined in terms of race, or whether it imposes a penalty of death in all cases of a given crime, subject to the option of the jury in some racially defined sub-class of the cases. The Fourteenth Amendment's obligation of equality extends not only to those "rights" which a State is federally compelled to give its citizens, but also to any benefits the State may choose to give any class of them, however gratuitously. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Watson* v. *City of Memphis*, 373 U.S. 526 (1963).

[36] Execution by the State of the death sentence which it has given juries discretion to impose clearly provides that "interplay of governmental and private action," *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 463 (1958), quoted in *Anderson* v. *Martin*, 375 U.S. 399, 403 (1964), which makes the State responsible for the discrimination. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

upon a showing of exclusion continuing during an extended period of years, without inquiry whether the same jury commissioners served throughout the period. E.g., *Neal* v. *Delaware*, 103 U.S. 370 (1881); *Bush* v. *Kentucky*, 107 U.S. 110 (1882); *Hernandez* v. *Texas*, 347 U.S. 475 (1954). Congress, when it enacted the 1866 Civil Rights Act knowing that "In some communities in the South a custom prevails by which different punishment is inflicted upon the blacks from that meted out to whites for the same offense,"[37] intended precisely by the Act, and subsequently by the Fourteenth Amendment, to disallow such "custom" as it operated through the sentences imposed by particular judges and juries.[38]

So the question on this record is one of proof: whether petitioner has made a sufficient showing of racially discriminatory capital sentencing under Arkansas' rape statutes. The court of appeals below held that he had not, and in so holding rested its decision upon two principles of sufficient generality and importance to merit this Court's review on certiorari. First, the court of appeals rejected without discussion petitioner's attempt to apply the "prima facie" evidence principle of the jury-exclusion cases to proof of sentencing discrimination. Stating that "the burden is on the one asserting discrimination" (C.A. 6), it declined to find that burden carried because: "The circumstances of each rape case have particular pertinency. We are given no information as to how many Negroes and how many whites, after investigation, were not charged" (C.A. 9). Second, it rejected petitioner's attempt to draw

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[37] Cong. Globe, 39th Cong., 1st Sess. 1758 (4/4/1866) (remarks of Senator Trumbull, who introduced, reported and managed the bill which became the act).

[38] See the text of the act *supra*; see also, e.g., Cong. Globe, 39th Cong., 1st Sess. 475 (1/29/1866), 1759 (4/4/1866) (remarks of Senator Trumbull).

evidentiary support from the fifty-year history of administration of capital punishment for rape in Arkansas, on the ground that "The defense argument goes too far and would, if taken literally, make prosecution of a Negro impossible in Arkansas today because of the existence in the past of standards which are now questionable." (C.A. 9.) Together, these grounds make proof of discrimination in the application of the death penalty nigh impossible.

Petitioner does not seek to tangle the State of Arkansas in past sins. He seeks only a fair opportunity to demonstrate the obvious: that his present incarceration under sentence of death is the product of a long-continued and continuing system of discriminatory administration of justice, operating in every gap of discretion left by the State's written law, to deny him equal treatment and subject him to extreme punishment which in practice is virtually never applied to the white man, but is reserved as the ultimate weapon of terror to hold the Negro in his place. To show this, he relies on the past, and necessarily so. "Institutions, like other organisms, are predominantly what their past has made them. History provides the illuminating context within which the implications of present conduct may be known." *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 69 (1961). It is unreasonable to seek to understand petitioner's death sentence in isolation from history—most pertinently, Arkansas' long-time practice of systematic jury exclusion, see, e.g., *Bailey* v. *Henslee,* 287 F.2d 936 (8th Cir. 1961); *Henslee* v. *Stewart,* 311 F.2d 691 (8th Cir. 1963), and Arkansas' fifty-year experience in the exercise of jury discretion to impose the death sentence for rape. This Court has looked far into the past in jury-exclusion cases, e.g., *Arnold* v. *North Carolina,* 376 U.S. 773 (1964), and by the nature of things proof of capital sentencing discrimina-

tion requires a still more extended canvass. For the death sentence is rarely imposed; it is a random scourge—albeit applied better than nine times to one against a Negro.

Petitioner asks this Court to consider whether he has not made a prima facie showing of discrimination, sufficient to throw some burden of explanation on the State. Because of the Fourteenth Amendment's overriding purpose to secure racial equality, "racial classifications [are] 'constitutionally suspect,' . . . and subject to the 'most rigid scrutiny.' . . ." *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964). This principle has as its corollary that a sufficient initial showing of unequal treatment of the races is made, calling State procedures in question, whenever it appears that the races are substantially disproportionately represented in groups of persons differently disposed of under those procedures: such a showing compels the inference that a State is drawing the racial line unless the State offers some justification in non-racial factors for the disproportion. E.g., *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Reece* v. *Georgia*, 350 U.S. 85 (1955); *Eubanks* v. *Louisiana*, 356 U.S. 584 (1958); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *cf. Oyama* v. *California*, 332 U.S. 633 (1948). Here the disproportion is extreme: more than nine executed Negroes to one executed white over fifty years. The district court impermissibly circumscribed petitioner's proof by limiting to three counties his inquiry into the causes of the disproportion, but the evidence taken in the counties—treated by the district court as a "trial run" and apparently thought by the court of appeals not unrepresentative of the State (C.A. 18)—clearly negatived the possibility that the nine-and-a-half to one ratio was accounted for by differing numbers of rape convictions for the races. Three whites to two Negroes were charged, and an equal number of whites and Negroes convicted of rape.

This alone should suffice to make an initial showing of racial discrimination and throw the burden of explanation to the State. Of course it is true, as the court of appeals said, that the circumstances of each particular rape case are significant for sentencing. To determine with scientific precision the influence of the racial factor in capital sentencing, it would be desirable to gather data concerning, and to hold constant, other potential factors: the number of assailants and victims in a rape episode, the ages of the defendant and the prosecutrix, the character of each, the degree of force which the sentencing jury could find that the defendant employed, and the degree of resistance with which he was met, the extent of injury if any to the prosecutrix—in all, an innumerable host of details about the parties, the offense and the trial. Many of these matters cannot be shown with respect to past rape prosecutions. Many can, and with far more ease by the State than by the petitioner. Whatever the State can show in explanation should be permitted to be shown and then evaluated. The issue on the present record is whether the State has any obligation to show anything, or whether it may rest silent in the teeth of evidence that more than nine times the number of Negroes than whites convicted of rape are sentenced to death.

This Court should hold that the State may not rest on such a record. Several considerations support the holding.

First, the hypothesis of racial discrimination is particularly likely in view of the coincidence between the Arkansas figures and those of the other jurisdictions—all southern—which have executed persons for rape during the past thirty years. For all jurisdictions, the Negro-white ratio is nine to one—although for other crimes than rape it is about one to one. Studies and observations by students of the criminal process tend to support the hypothesis of

discrimination. E.g., *Bullock, Significance of the Racial Factor in the Length of Prison Sentences,* 52 J. CRIM. L., CRIM. & POL. SCI. 411 (1961); *Wolfgang, Kelly & Nolde, Comparison of the Executed and the Commuted among Admissions to Death Row,* 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962); *Hartung, Trends in the Use of Capital Punishment,* 284 ANNALS 8, 14-17 (1952); WEIHOFEN, THE URGE TO PUNISH 164-165 (1956).

Second, the broader picture of Arkansas life and law cannot be ignored. The State's resistance to the rights of Negro school children and to the law of the land at Little Rock, its pattern of excluding Negroes from its criminal juries, have a place in the estimate of probabilities. Arkansas still by statute forbids the intermarriage of whites with Negroes, ARK. STAT. ANN. §§55-104, 55-105 (1947), and punishes interracial cohabitation (called concubinage) as a felony, although intraracial cohabitation is a misdemeanor, ARK. STAT. ANN. §§41-805 to 41-810 (1964). The lesson it thus officially teaches its citizens respecting the abhorrence in which even voluntary interracial sexual relations should be held cannot help but have an impact on the views which a criminal jury will hold of an interracial rape. Cf. *Peterson* v. *City of Greenville,* 373 U.S. 244 (1963); *Lombard* v. *Louisiana,* 373 U.S. 267 (1963); *Robinson* v. *Florida,* 378 U.S. 153 (1964).[39]

Third, the absolute discretion which Arkansas law gives jurors to decide between life and death, undirected by any rational standards for making that decision, see part

[39] On the statute books of Arkansas still stand requirements of segregation in railroads (including waiting rooms), Ark. Stat. Ann. §73-1218 (1957), street cars, Ark. Stat. Ann. §73-1614 (1957), buses, Ark. Stat. Ann. §73-1747 (1957), schools, Ark. Stat. Ann. §80-509 (1960), penal institutions, Ark. Stat. Ann. §§46-144, 46-145 (1964), deaf and blind institutes for children, Ark. Stat. Ann. §80-2401 (1960), chain gangs, Ark. Stat. Ann. §76-1119 (1957), and any "establishment where gaming is legal," Ark. Stat. Ann. §84-2724 (1960).

III(B), *infra*, invites the influence of arbitrary and discriminatory considerations. This Court has long been concerned with a vagueness of criminal statutes which "licenses the jury to create its own standard in each case." *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). See, e.g., *Smith* v. *Cahoon*, 283 U.S. 553 (1931); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926); *Winters* v. *New York*, 333 U.S. 507 (1948). The vice of such statutes is not alone their failure to give fair warning of prohibited conduct, but the breadth of room they leave for jury caprice and suasion by impermissible considerations, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-433 (1963); *Freedman* v. *Maryland*, 380 U.S. 51, 56 (1965); *Lewis, The Sit-In Cases: Great Expectations*, [1963] SUPREME COURT REVIEW 101, 110; Note, 109 U. PA. L. REV. 67, 90 (1960), including racial considerations, see *Louisiana* v. *United States*, 380 U.S. 145 (1965); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Cox* v. *Louisiana*, 379 U.S. 536 (1965). Unlimited sentencing discretion in a capital jury presents this vice in the extreme. To paraphrase *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 505 (1952): "Under such a standard the most careful and tolerant [lay juror] . . . would find it virtually impossible to avoid favoring one [race] . . . over another."

Petitioner requests the Court to grant certiorari, that it may review and reverse the judgment of the court of appeals, which cast an unwarranted and impossible burden upon petitioner in demonstrating that he had been denied equal treatment in the most grievous penalty known to law.

B. *The Court should grant certiorari to consider petitioner's contention that his sentence is unconstitutional under the Eighth and Fourteenth Amendments.*

The issue which three Justices of the Court thought deserving of certiorari in *Rudolph* v. *Alabama*, 375 U.S. 889 (1963), was deemed by the court of appeals below one which "must be for the Supreme Court in the first instance." P. 16, *supra*. The Fourth Circuit has taken the same view. *Ralph* v. *Pepersack*, 335 F.2d 141 (4th Cir. 1964). Petitioner respectfully requests the judgment of the Court on the issue.

The question is not, in this aspect, whether on any rational view which one might take of the purpose of criminal punishment, the defendant's conduct as the jury might have found it at its worst on this record could support a death sentence consistent with civilized standards for the administration of criminal law. As the issue of penalty was submitted to the jury in their unlimited discretion under Arkansas procedure,[40] their attention was directed to none of the purposes of criminal punishment, nor to any aspect or aspects of the defendant's conduct. They were not invited to consider the extent of physical harm to the prosecutrix, the moral heinousness of the defendants' acts, his susceptibility or lack of susceptibility to reformation, the extent of the deterrent effect of killing the defendant "*pour décourager les autres.*" Cf. *Packer, Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964). They were permitted to choose between life and death upon conviction for any reason, rational or irrational, or for no reason at all: at a whim, a vague caprice, or because of the color of petitioner's skin if that

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[40] *Allison* v. *State*, 204 Ark. 609, 164 S.W.2d 442 (1942); *Rorie* v. *State*, 215 Ark. 282, 220 S.W.2d 421 (1949).

did not please them. In making the determination to impose the death sentence, they acted wilfully and unreviewably, without standards and without direction. Nothing assured that there would be the slightest thread of connection between the sentence they exacted and any reasonable justification for exacting it. Cf. *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). A judgment so unconfined, so essentially erratic, is per se cruel and unusual because it is purposeless, lacking in any relationship by which its fitness to the offense, or to the offender or to any legitimate social purpose may be tested. It is cruel not only because it is extreme but because it is wanton; and unusual not only because it is rare, but because the decision to remove the defendant from the ordinary penological regime is arbitrary. To concede the complexity and interrelation of sentencing goals, see *Packer, supra*, is no reason to sustain a statute which ignores them all. It is futile to put forward justifications for a death so inflicted; there is no assurance that the infliction responds to the justification or will conform to it in operation. Inevitably under such a sentencing regime, capital punishment in those few, arbitrarily selected cases where it is applied both is " 'disproportioned to the offenses charged' " and constitutes " ' unnecessary cruelty.' " *Rudolph* v. *Alabama, supra*, 375 U.S. at 891.[41]

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[41] The United States Department of Justice has taken the following position on continued imposition of the death penalty: "We favor the abolition of the death penalty. Modern penology with its correctional and rehabilitation skills affords greater protection to society than the death penalty which is inconsistent with its goals. This Nation is too great in its resources and too good in its purposes to engage in the light of present understanding in the deliberate taking of human life as either a punishment or a deterrent to domestic crime." Letter of Deputy Attorney General Ramsey Clark to the Honorable John L. McMillan, Chairman, District of Columbia Committee, House of Representatives, July 23, 1965, reported in *New York Times*, July 24, 1965, p. 1, col. 5.

III.

Certiorari should be granted to determine whether use of poll tax books containing racial designations, as required by statute, in the system of jury selection is constitutional.

This Court has long made clear that "Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race." *Cassell* v. *Texas*, 339 U.S. 282, 286. Petitioner contends that the jury selection procedures established by state law and used in Garland County, Arkansas, encourage and permit the selection of jurors on the basis of race, in violation of the Fourteenth Amendment.

In Garland County, petit jury lists are selected by a jury commission consisting of three commissioners who meet together periodically and draw up a list of names (Tr. 47, 64). They rely primarily on their knowledge of persons in the community (Tr. 61), but also use a telephone book (Tr. 60, 77) and a list of persons who have previously served (Tr. 55, 77). At the time of petitioner's trial, only qualified electors who had paid the poll tax were eligible to be jurors.[42] Thus the jury commissioners checked the poll tax books to determine whether the persons they had selected were qualified. In accordance with statute, Ark. Stat. Ann. §3-118 (1956), the poll tax books designated the race of all qualified electors (Tr. 57, 59).

In the recent case of *Hamm* v. *Virginia State Board of Elections*, 230 F. Supp. 156 (E.D.Va. 1964) aff'd sub nom. *Tancil* v. *Woolls*, 379 U.S. 19, a three-judge district court declared that Virginia statutes requiring that lists of

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[42] In November, 1964, Arkansas approved a constitutional amendment outlawing the poll tax. Ark. Const., Amend. 51.

voters and taxpayers be kept in separate books according to race violated the Fourteenth Amendment. The district court stated that it was now

> axiomatic that no State can directly or casually promote a distinction in the treatment of persons solely on the basis of their color. To be within the condemnation, the governmental action need not effectuate segregation of facilities directly. *Cf. Anderson v. Martin*, 375 U.S. 399, 402, 84 S. Ct. 454, 11 L. Ed. 439 1964. The result of the statute or policy must not tend to separate individuals by reason of difference in race or color. No form of State discrimination, no matter how subtle, is permissible under the guarantees of the Fourteenth Amendment. 230 F. Supp. at 157-158.

One of the Virginia statutes struck down dealt specifically with poll tax lists.[43]

The court of appeals in this case, however, merely stated that the *Hamm* case "appears to cast some doubt on [the] validity" of racially designated poll tax books (C.A. 15). By refusing to give full weight to the three-judge court's decision and this Court's affirmance, the court of appeals was able, in a capital case, to avoid the full force of petitioner's constitutional claim. The court should have acknowledged that racially designated poll tax books are unconstitutional and should have examined Arkansas' jury selection procedures from this starting point. Its failure to do this, and the consequent need for clarification of the issue, is reason enough for this Court to grant certiorari.

The court of appeals tried to minimize the significance of the racially designated poll tax books on the ground that

[43] The Arkansas statute differs in that it does not call for separate books, but this distinction is without significance.

the jury commissioners drew up an independent list of jurors before consulting the poll tax book. But the fact that an independent list is drawn up first does not eliminate the many opportunities for discrimination created by the statutorily imposed system of racial designations.

A selection procedure which provides unnecessary opportunities for discrimination violates the Fourteenth Amendment. In *Avery* v. *Georgia,* 345 U.S. 559, a conviction was reversed because the names of potential jurymen were placed on different colored slips according to race. The trial judge testified that he selected the slips without regard to color, but Chief Justice Vinson stated that "Even if the white and yellow tickets were drawn from the jury box without discrimination, opportunity was available to resort to it at other stages in the selection process." *Id.* at 562. And Justice Frankfurter, concurring said: "We may accept the testimony of the judge who drew the slips from the box as to the honesty of his purpose; that testimony does not refute the fact that there were opportunities to discriminate, as experience tells us there will inevitably be when such differentiating slips were used. *Id.* at 564.

That a state must not provide unnecessary "opportunities to discriminate" is also shown by *Anderson* v. *Martin,* 375 U.S. 559, where this Court ended the Louisiana practice of designating the race of all candidates for public office. There was, of course, no positive proof that these racial designations in any way influenced the voting patterns of Louisiana citizens. Nonetheless, the Court held that the designations were unconstitutional because the state was indicating that race was "an important—perhaps paramount—consideration" in a voter's choice. *Id. at* 402. The Court added that a state cannot "encourage its citizens to vote for a candidate solely on account of

race. Cf. *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 203, 89 L. Ed. 173, 183, 65 S. Ct. 226 (1944). And that which cannot be done by express statutory prohibition cannot be done by indirection." *Id.* at 404. In the jury situation it is clear that a state cannot encourage, or even permit, its jury commissioners to select juries on the basis of race. But the Arkansas procedure, "by indirection," both permits and encourages selection along racial lines.

The Court of Appeals, having held against petitioner on the merits, stated that it was "unnecessary to consider the argument [raised in the district court] that Maxwell waived any objections to the petit jury panel and did so within the permitted scope of *Fay* v. *Noia, supra,* 372 U.S. 438-40 (1963)." The district court had strongly suggested that petitioner waived his rights with respect to jury selection by failing to raise the issue in the state courts. It relied on the fact that the attorney who represented petitioner in the state courts was aware of petitioner's constitutional rights and familiar with the procedure for selecting jurors in Garland County. The district court also noted the trial attorney's testimony that he had "discussed the jury panel" with petitioner. It apparently interpreted this testimony as meaning that the attorney had discussed with Maxwell the jury selection procedures used in Arkansas. A more plausible interpretation is that the attorney merely talked with petitioner about the desirability of certain jurors. There was no explicit evidence that the attorney discussed with petitioner the question of raising or not raising a challenge to the method of jury selection by motion to quash, and, in fact, the attorney testified that he never gave petitioner this choice (Tr. 297-298, 305-306). There is no evidence that petitioner knew or understood the nature of the right involved or the particular practices of the jury commission attacked here.

Waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U.S. 458, 464. In *Fay* v. *Noia,* 372 U.S. 391, this Court declared that "the doctrine of fictitious waiver is unacceptable." The strict standards required by the courts before finding waiver of the constitutional right to a jury chosen without discrimination on account of race are set forth in a line of Fifth Circuit cases. *United States ex rel. Goldsby* v. *Harpole,* 263 F.2d 71 (5th Cir. 1959), cert. denied, 361 U.S. 838; *United States ex rel. Seals* v. *Wiman,* 304 F.2d 53 (5th Cir. 1962), cert. denied 372 U.S. 924; *Whitus* v. *Balkcom,* 333 F.2d 496 (5th Cir. 1964), cert denied, 379 U.S. 93; *Cobb* v. *Balkcom,* 339 F.2d 95 (5th Cir. 1964). In *Goldsby* and *Seals,* as in the case of petitioner, "the important fact . . . was that the attorney for the Negro defendant did not consult his client with regard to his decision to refrain from making attacks on the jury system." *Whitus, supra,* 333 F.2d at 502. Thus the fact that trial counsel did not raise the issue with respect to county jury selection methods can in no way prejudice petitioner, for petitioner was never actually consulted concerning the attorney's failure to raise the issue.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1965

No. 429

WILLIAM L. MAXWELL,

Petitioner,

v.

DAN D. STEPHENS, Superintendent of Arkansas State Penitentiary.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,729

September Term, 1964

WILLIAM L. MAXWELL,

Appellant,

vs.

DAN D. STEPHENS, Superintendent of Arkansas State Penitentiary.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

Judgment of Court of Appeals

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court entered May 6th, 1964 in this cause, denying petition for writ of habeas corpus be, and the same is hereby, affirmed, in accordance with majority opinion of this Court this day filed herein.

June 30, 1965.

Order entered in accordance
with majority opinion:—

ROBERT C. TUCKER
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,729

WILLIAM L. MAXWELL,

Appellant,

v.

DAN D. STEPHENS, Superintendent of Arkansas State Penitentiary,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

[June 30, 1965.]

Before MATTHES, BLACKMUN, and RIDGE, Circuit Judges.

BLACKMUN, Circuit Judge.

William L. Maxwell, a Negro possessing an eighth grade education, stands convicted by a jury in the Circuit Court of Garland County, Arkansas, of the crime of rape, as defined by § 41-3401, Arkansas Statutes 1947. The offense was committed on November 3, 1961. Maxwell at the time was 21 years of age. The jury did not "render a verdict

of life imprisonment in the State penitentiary at hard labor", as it had the right to do under §§ 43-2153 and 41-3403, and for which it had been given an alternate verdict form. As a consequence, and in line with the interpretation consistently given § 43-2153 by the Supreme Court of Arkansas,[1] the death sentence was imposed. On appeal the conviction was affirmed. *Maxwell* v. *State*, 236 Ark. 694, 370 S.W.2d 113 (1963).[2]

Four days before the execution date which was fixed following that unsuccessful appeal Maxwell filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas. Judge Young conducted a hearing on the federal constitutional issues raised by that petition. Briefs were filed. The court wrote a detailed opinion denying the relief requested, *Maxwell* v. *Stephens*, 229 F.Supp. 205 (E.D. Ark. 1964), but then granted Maxwell's petition for a certificate of probable cause, as contemplated by 28 U.S.C. § 2253, and further stayed execution.

Except for an early period prior to the state trial when court appointed attorneys were in the case, Maxwell has been represented through all the state and federal proceedings by competent, although different, non-court-appointed counsel.

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[1] *Kelley* v. *State*, 133 Ark. 261, 202 S.W. 49, 54 (1918); *Bullen* v. *State*, 156 Ark. 148, 245 S.W. 493, 494 (1922); *Clark* v. *State*, 169 Ark. 717, 276 S.W. 849, 853-54 (1925); *Smith* v. *State*, 205 Ark. 1075, 172 S.W.2d 248, 249 (1943); *Turner* v. *State*, 224 Ark. 505, 275 S.W.2d 24, 31 (1955); *Stewart* v. *State*, 233 Ark. 458, 345 S.W.2d 472, 475 (1961), cert. denied 368 U.S. 935.

[2] No petition for certiorari was filed with the Supreme Court of the United States. This of course no longer constitutes a failure to exhaust available state remedies. *Fay* v. *Noia*, 372 U.S. 391, 435-38 (1963); *Curtis* v. *Boeger*, 331 F.2d 675 (8 Cir. 1964).

We note, as we have noted before in other cases of this type,[3] that Maxwell's guilt or innocence is not in issue before us. This is still another situation where, as the United States Supreme Court described the posture of an earlier Arkansas case, " . . . what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved". *Moore* v. *Dempsey*, 261 U.S. 86, 87-88 (1923).

The circumstances and details of the crime are, as usual, sordid. They are set forth in the Arkansas opinion, pp. 114-16 of 370 S.W.2d, and need not be repeated here. It suffices only to say that the victim was a white woman, 35 years old, who lived with her helpless ninety-year-old father; that their home was entered in the early morning by the assailant's cutting or breaking a window screen; that in the ensuing struggle the victim bit her assailant and caused bleeding; and that she was assaulted and bruised, her father injured, and the lives of both threatened. Confessions taken from Maxwell were not employed at the trial. The defense presented no evidence. The jury was out several hours. No question is raised as to the sufficiency of the evidence.

On this habeas corpus appeal Maxwell presses three issues:[4] (1) he was denied due process of law and the

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[3] *Bailey* v. *Henslee*, 287 F.2d 936, 939 (8 Cir. 1961), cert. denied 368 U.S. 877; *Henslee* v. *Stewart*, 311 F.2d 691, 692 (8 Cir. 1963), cert. denied 373 U.S. 902.

[4] Other issues urged in the district court, see pp. 208-09 and 211-12 of 229 F.Supp., but abandoned on this appeal, were the legality of Maxwell's arrest, the denial of a motion for change of venue, the validity of confessions taken from him, and the legality of a search of his person and of the clothing which he was wearing. This search produced or revealed a hair, a nylon thread, and blood and seminal stains which tended to identify him as the intruder-assailant.

equal protection of the laws, guaranteed by the Fourteenth Amendment, because he was sentenced under statutes which are discriminatorily enforced against Negroes; (2) he was denied due process and equal protection because the Garland County jury lists revealed race and were compiled from racially designated poll tax books; and (3) the taking of his coat while he was in custody, and references to it in testimony at the trial,[5] violated rights guaranteed to him under the Fourth, Fifth, and Fourteenth Amendments.

A. The statute's enforcement. The argument here is that § 41-3403, which prescribes the death penalty for rape, and § 43-2153, which, since its enactment as Acts 1915, No. 187, § 1, permits a jury in a death punishment case to render a verdict of life imprisonment, although perhaps constitutionally valid on their face, have been discriminatorily enforced against members of the Negro race and in favor of members of the white race. It is claimed that in practice "Negroes remain liable to the supreme penalty for the crime of rape, but whites, with very rare exceptions, suffer lesser punishments"; that "there is reason to believe that every person suffering the death penalty has been convicted of a crime against a white woman"; that "All but two of the men executed for rape since 1913 have been Negroes"; that Negro defendants are more likely to be sentenced to death and

[5] No point is apparently made about the fact the coat itself (despite a contrary statement in the Maxwell brief) was not introduced in evidence. In view of this, we do not raise the point on our own accord. We assume that, for present purposes, questions of admissibility are as applicable to testimony concerning the coat as to the coat itself. *McGinnis* v. *United States*, 227 F.2d 598, 603 (1 Cir. 1955); *Williams* v. *United States*, 263 F.2d 487, 488-89 (D.C. Cir. 1959). See *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 391-92 (1920), and *Wong Sun* v. *United States*, 371 U.S. 471, 484 (1963).

only white women are protected by the deterrence of the supreme penalty; that in Garland County (Hot Springs), Pulaski County (Little Rock), and Jefferson County (Pine Bluff), in the decade beginning January 1, 1954, only three charges were lodged against white men for the rape of Negro women; that one of these resulted in an acquittal and the other two in reduced charges; that in the same period seven Negroes were charged with raping white women; that of these, two were sentenced to death, three to life imprisonment, one dismissed, and one not apprehended; that "This history raises serious doubts about the fairness of Arkansas' system of criminal justice"; that the figures are not to be explained by the proportion of Negroes in the state's total population nor by any claim that the crime rate is higher among Negroes, for in the three counties about two-thirds of the rape charges were against white persons; that the proportion of Negroes who receive the death penalty "cries out for an explanation"; that race is the answer; and that the state should be required to come forward with a rational explanation.

It is further argued that there is no basis for assuming a Negro's victims have better character than the victims of whites; that differing sentences for Negroes and whites are consistent with Arkansas' system of justice; that responsibility for administration of penalties in rape cases lies with other officials besides juries; that "it is not what public officials say but what they do which must be determinative when discrimination is at issue"; that in Maxwell's state court proceedings "several occurrences underscored the presence of the racial factor", namely, the use of the term "nigger", the excuse or successful challenge of the nine Negroes who were called for jury service, and

the prosecutor's reference to the race of the defendant and the victim three times during the state trial "under the guise of requesting the jurors to dismiss the fact from their minds"; that the state's laws on segregation and the history of the resistance to desegregation of schools in Little Rock are consistent with the contention that race is a factor in the disposition of rape cases and the imposition of the death penalty; that the court erred in restricting the defense proof of race figures to the three counties; and that, finally, the imposition of the death penalty for rape violates due process in that it is a cruel and unusual punishment.

This question of unconstitutionality in application was raised both in the Supreme Court of Arkansas and in the United States district court. Each tribunal decided the issue adversely to Maxwell. Pp. 117-18 of 370 S.W.2d; pp. 216-17 of 229 F.Supp.

There can be no doubt that the equal protection clause of the Fourteenth Amendment and 42 U.S.C. § 1981,[6] which implements it, (and, it would appear, Art. 2, § 3, of the Arkansas Constitution)[7] operate to invalidate any state statute which would differentiate punishment solely on the basis of race. *Virginia* v. *Rives,* 100 U.S. 313, 318 (1879); *Strauder* v. *West Virginia,* 100 U.S. 303, 307 (1879); *McLaughlin,* v. *Florida,* 379 U.S. 184, 192-94 (1964); see *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942). We recognize, too, that a statute's discriminatory admin-

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[6] Section 1981. "All persons within the jurisdiction of the United States . . . shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

[7] "The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous condition."

istration or enforcement, dictated solely by considerations of race, runs afoul of the equal protection clause. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886); see *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944).

This court has not been insensitive to constitutional claims based upon race. See, for example, *Aaron* v. *Cooper*, 257 F.2d 33 (8 Cir. 1958), aff'd 358 U.S. 1; *Bailey* v. *Henslee*, 287 F.2d 936 (8 Cir. 1961), cert. denied 368 U.S. 877; and *Henslee* v. *Stewart*, 311 F.2d 691 (8 Cir. 1963), cert. denied 373 U.S. 902. "But purposeful discrimination may not be assumed or merely asserted . . . It must be proven. . . .", and the burden is on the one asserting discrimination. *Swain* v. *Alabama*, 380 U.S. 202, 205, 209 (1965); *Tarrance* v. *Florida*, 188 U.S. 519, 520 (1903).

A meticulous review of the entire record in the United States district court and of the entire record in the state court convinces us that no federally unconstitutional application of the Arkansas rape statutes to this defendant has been demonstrated. We reach this result upon the following considerations:

1. The statistical argument is not at all persuasive. The evidence as to the state at large showed that, in the 50 years since 1913, 21 men have been executed for the crime of rape; that 19 of these were Negroes and two were white;[8] that the victims of the 19 convicted Negroes were white females; and that the victims of the two convicted whites were also white females. As to Garland County, for the decade beginning January 1, 1954, Maxwell's evidence was to the effect that seven whites were

[8] *Needham* v. *State*, 215 Ark. 935, 224 S.W.2d 785 (1949); *Fields* v. *State*, 235 Ark. 986, 363 S.W.2d 905 (1963).

charged with rape (two of white women and the race of the other victims not disclosed), with four whites not prosecuted and three sentenced on reduced charges; that three Negroes were charged with rape, with one of a Negro woman not prosecuted and another of a Negro receiving a reduced sentence, and the third, the present defendant, receiving the death penalty. With respect to Pulaski County for the same decade, there were 11 whites (two twice) and 10 Negroes charged, with the race of the victim of two whites and one Negro not disclosed. Three whites received a life sentence. One white was acquitted of rape of a Negro woman. One received a sentence on a reduced charge, two were dismissed, two cases remained pending, one was not prosecuted, and the last was executed on a conviction for murder.[9] Of the Negroes, three with white victims and two with Negro victims received life. One case was dismissed, one was not arrested, two with Negro victims were sentenced on reduced charges, and one, Bailey, with a white victim, was sentenced to death. In Jefferson County eight Negroes were charged, with the cases against five dismissed, another dismissed when convicted on a murder charge, and two receiving sentences on reduced charges. Sixteen whites were charged. One was charged three times with respect to Negro victims and as to two of these charges received five years suspended on a guilty plea. Two others received three year sentences. One is pending, one was

[9] *Leggett* v. *State*, 227 Ark. 393, 299 S.W.2d 59 (1957); *Leggett* v. *State*, 228 Ark. 977, 311 S.W.2d 521 (1958), cert. denied 357 U.S. 942; *Leggett* v. *Henslee*, 230 Ark. 183, 321 S.W.2d 764 (1959), cert. denied 361 U.S. 865; *Leggett* v. *State*, 231 Ark. 7, 328 S.W.2d 250 (1959); *Leggett* v. *State*, 231 Ark. 13, 328 S.W.2d 252 (1959); *Leggett* v. *Kirby*, 231 Ark. 576, 331 S.W.2d 267 (1960).

executed,[10] and the rest were dismissed. The race of four defendants was not disclosed; three of these cases were dismissed and one is pending.

The complaint as to the federal court's restricting the statistical inquiry to three counties was not preserved by objection or offer of proof and there is no claim here that material from the State's remaining counties would be any more significant than that of the three counties presented.

These facts do not seem to us to establish a pattern or something specific or useful here, or to provide anything other than a weak basis for suspicion on the part of the defense. The figures certainly do not prove current discrimination in Arkansas, for in the last fourteen years the men executed for rape have been two whites and two Negroes. The circumstances of each rape case have particular pertinency. We are given no information as to how many Negroes and how many whites, after investigation, were not charged. Note *Hamm* v. *State*, 214 Ark. 171, 214 S.W.2d 917 ((1948), where a Negro convicted of rape of a white woman received a life sentence.

Turning to the three county statistics, we find no death sentence at all in Garland County in the 1954-1963 decade until Maxwell's case. We also find that of the two other Negroes charged, one was not prosecuted and the other was sentenced on a reduced charge. In Pulaski County we have about the same number of whites and Negroes charged, with only one death penalty, albeit in an interracial case, and one acquittal, also in an interracial case. But members of both races, three whites and five Negroes (three interracial), received life sentences. In Jefferson

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[10] *Fields* v. *State*, supra, 235 Ark. 986, 363 S.W.2d 905 (1963).

County we find few convictions for either race but one white man with a white victim was executed.

2. The defense argument goes too far and would, if taken literally, make prosecution of a Negro impossible in Arkansas today because of the existence in the past of standards which are now questionable. This would effect discrimination in reverse. The fact that this court has concluded that certain Arkansas procedures did not meet constitutional standards as interpreted by the Supreme Court (see *Bailey* v. *Henslee*, supra, 287 F.2d 936, and *Henslee* v. *Stewart*, supra, 311 F.2d 691, but compare *Moore* v. *Henslee*, 276 F.2d 876 (8 Cir. 1960)) does not mean that this former defect must permeate all subsequent proceedings in the state so as to render them unconstitutional. We pointed this out, as to jury selection, in *Bailey* v. *Henslee*, supra, p. 943 of 287 F.2d, where we said, "Discriminatory selection in prior years does not nullify a present conviction if the selection of the jury for the current term is on a proper basis", and where we noted the Supreme Court's comment, in *Brown* v. *Allen*, 344 U.S. 443, 479 (1953), that "Former errors cannot invalidate future trials".

3. The "nigger" references, while unfortunate, are only two in number and no objection was made to either. Both were at the state court hearing on defense motions when no jury was present. One was by the then superintendent of the state penitentiary. The other was the prosecutor's reference to "white persons or nigger persons". Throughout the balance of that hearing, throughout the entire state court trial, and throughout the federal habeas corpus

proceeding, although race is necessarily mentioned many times, not one other instance of this kind appears.

4. The other race references, complained of by the defense, are three in number. The first was in the prosecutor's opening statement to the jury: "I want to ask you first and tell you that it is your duty, and the Court will so instruct you, to put from your mind any thought of race. Ladies and Gentlemen, race has nothing to do with it . . .". The other two were of like import in his closing argument. We find no error in these three references. On their face they are as indicative of complete fairness as of unfairness. No point is raised as to tone of voice, attitude, or demeanor. The race of both the victim, who testified, and of Maxwell, who of course was present in court, was obvious. The comments, as we read them in context in the cold record, could well be deserving of commendation, rather than condemnation.

5. The fact that in this particular case the nine Negroes who appeared for jury service were all excused for cause by the court (three) or peremptorily challenged by the prosecution (six) and, as a consequence, the petit jury was all white, is not an unconstitutional result. *Swain* v. *Alabama*, supra, 380 U.S. 202, 209-22 (1965); *Hall* v. *United States*, 168 F.2d 161, 164 (D.C. Cir. 1948), cert. denied 334 U.S. 853; *United States ex rel. Dukes* v. *Sain*, 297 F.2d 799 (7 Cir. 1962), cert. denied 369 U.S. 868. See *Frazier* v. *United States*, 335 U.S. 497, 507 (1948).

6. We are aware of the comments of three Justices, at 375 U.S. 889-91, dissenting from the Supreme Court's denial of certiorari in *Rudolph* v. *Alabama*, 275 Ala. 115, 152

So.2d 662 (1963). The dissenters would have had the Court consider in that case whether the Eighth Amendment,[11] with its prohibition of "cruel and unusual punishments", and the Fourteenth "permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life". It is to be observed that the record before us reveals that the rapist of the victim here was evidently not one who failed to endanger human life. He struck and injured a helpless and aged man, he bruised the victim and he threatened to kill both. Despite whatever personal attitudes lower federal court judges as individuals might have toward capital punishment for rape, any judicial determination that a state's (in this case, Arkansas') long existent death-for-rape statute (it has been on the books since December 14, 1842) imposes punishment which is cruel and unusual, within the language of the Eighth Amendment and, by referenced inclusion, violative of due process within the meaning of the Fourteenth Amendment, must be for the Supreme Court in the first instance and not for us. See *Ralph* v. *Pepersack*, 335 F.2d 128, 141 (4 Cir. 1964).

B. The selection of the petit jury. The defense argument here is that due process and equal protection have been denied Maxwell because the petit jury list was compiled from a racially designated poll tax book and because the jury list itself indicated race. This argument was not advanced in the state court proceedings.

In Arkansas petit jurors are selected from electors. Ark. Stat. 1947, § 39-208. Electors are persons who cur-

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[11] The Arkansas Constitution, Art. 2, § 9, also reads:

"Excessive bail shall not be required, nor shall excessive fines be imposed; nor shall cruel or unusual punishment be inflicted; nor witnesses be unreasonably detained."

rently have paid the State's poll tax. Ark. Const., Art. 3, § 1; Ark. Stat. § 3-104.2. The statutes require that the official list, bound as a book, of a county's poll tax payers, § 3-118, and the poll tax receipts, § 3-227(b), specify color.

In contrast to the situation in the district court, pp. 213-16 of 229 F.Supp., no issue is raised here as to any deficiency in the efforts or methods of the jury commissioners, as to underrepresentation of the Negro race in the Gerland County jury lists, or as to any pattern of Negro repeaters on the juries.

In *Bailey* v. *Henslee,* supra, p. 940 of 287 F.2d, we outlined at footnote 5 the methods prescribed by the Arkansas Statutes for the selection of jury commissioners and of jurors and, at pp. 941-45, we set forth, with extensive citations, the applicable general principles relative to race in jury selection. We cited four United States Supreme Court cases of particular pertinence. *Norris* v. *Alabama,* 294 U.S. 587 (1935); *Smith* v. *Texas,* 311 U.S. 128 (1940); *Avery* v. *Georgia,* 345 U.S. 559 (1953); and *Eubanks* v. *Louisiana,* 356 U.S. 584 (1958). In *Henslee* v. *Stewart,* supra, p. 694 of 311 F.2d, we again referred to the same principles and the same cases. To that list of four Supreme Court opinions one should now add *Arnold* v. *North Carolina,* 376 U.S. 773 (1964), where, with a substantial proportion of Negroes in the county and on the poll tax list but only one on a grand jury in 24 years, the Court held that a prima facie case of equal protection denial had been established, and *Swain* v. *Alabama,* supra, 380 U.S. 202, 205-09 (1965), where the Court held that there was no "forbidden token inclusion" and that a prima facie case of discrimination had not been made out when Negro representation on jury panels was existent though less than the percentage of Negro males in the county, when

there was an average of six to seven Negroes on petit jury venires in criminal cases although no Negro had actually served on a petit jury since 1950, and when an identifiable group in a community is underrepresented by as much as ten percent. See, also, *Coleman* v. *Alabama*, 377 U.S. 129 (1964).

In both *Bailey* and *Stewart* we concluded that the facts, in the aggregate, established a prima facie case of improper limitation of Negroes in the selection of a petit jury panel. Among the several factors which led to our conclusion in both *Bailey* and *Stewart* were the circumstances that the poll tax receipt carried, with other information, the color of the taxpayer and that the jury commissioners themselves affixed race identification marks to their lists. We mentioned, p. 947 of 287 F.2d, p. 695 of 311 F.2d, that this presented "a device for race identification with its possibility of abuse".

We do not reach the same conclusion here. Our reasons are the following: (1) There is no proof that the jury list was compiled from the poll tax list. Each jury commissioner specifically testified otherwise and asserted that a proposed list was first independently prepared and that the racially designated poll tax book was consulted only thereafter. It had to be consulted, of course, in order to ascertain that the persons tentatively selected were qualified electors. (2) Although the list of petit jurors formally transmitted by the jury commissioners to the clerk of court possessed, at the time of the habeas corpus hearing, a small handwritten "c" after eight of the 36 names thereon, exclusive of alternates, there was no positive evidence as to when those leters were affixed or by whom. The list had been compiled two months before the crime with which Maxwell was charged. Each commissioner

denied making the identifying marks. (3) The clerk testified that he had no personal recollection whether, when he opened the list, it had any marks as to color; that he was not certain he had placed the marks on the list; that sometimes he did this for his own information and for newspapers; and that on most lists the jury commissioners did indicate race. Even the defense attorneys here had examined this particular list prior to the habeas corpus hearing. (4) None of the commissioners recalled the presence of race marks in the poll tax books. Each justified this conclusion on the ground that the marks were insignificant and unimpressive. (5) for what it is worth, one of the jury commissioners here was a Negro. The clerk testified that, with the exception of one or two terms, there has been a Negro jury commissioner for every term of court in Garland County in the last nine years.

In the light of these facts, we cannot conclude that the selection of this particular petit jury was unconstitutionally discriminatory. The use of race identification marks is, of course, under principles presently espoused, and as we noted in *Bailey* and again in *Stewart*, most disturbing. Whether the Arkansas statutory provisions requiring race identification on poll tax receipts and on the poll tax books are unconstitutional is a question not yet finally resolved. *Hamm* v. *Virginia State Bd. of Elections,* 230 F.Supp. 156, 157-58 (E.D. Va. 1964), summarily aff'd. sub nom. *Tancil* v. *Woolls,* 379 U.S. 19, appears to cast some doubt on their validity. Yet that opinion also states that race designations in certain records may serve a useful and lawful purpose. Until these Arkansas statutory requirements are nullified or repealed it is to be presumed that local officials must and will comply with them. The pres-

ent action is not one to restrain such compliance. Persons desiring that result have the right to seek it. In the meantime, we cannot say that, because the poll tax receipts and books designate race, it necessarily follows that every jury list in Arkansas is automatically unconstitutional. So to conclude would ignore the important possibility of initial selection being made, as here, independent of the poll tax list. The Arkansas system may presently be imperfect but "an imperfect system is not equivalent to purposeful discrimination based on race". *Swain* v. *Alabama,* supra, p. 209 of 380 U.S. We hold that the manner of selecting this particular petit jury list avoided any constitutional obstacle which might be inherent in the state statutes requiring race identification.

This makes it unnecessary to consider the argument (strenuously urged by Stephens and upheld by the District Court, pp. 212-13 of 229 F.Supp., as an alternative ground) that Maxwell waived any objection to the petit jury panel and did so within the permitted scope of *Fay* v. *Noia,* supra, 372 U.S. 391, 438-40 (1963).

C. The coat. As has been noted, the controversial coat was not introduced in evidence at the state court trial. Witnesses, however, made references to it in their testimony.

Maxwell, of course, has standing to complain of these references. *Jones* v. *United States,* 362 U.S. 257, 265-67 (1960).

The facts here are important: The offense took place at approximately three o'clock in the morning of November 3, 1961. It was raining and wet. The victim was promptly taken by the police to a hospital. At the hospital she described her assailant to Captain Crain of the Hot Springs

Police Department and to Officer O. D. Pettus, a Negro. She stated that the man had told her he was Willie C. Washington. Two persons with that name, senior and junior, were brought before her but she identified neither. She described her attacker in greater detail. Pettus thereupon suggested that it might have been Maxwell. Officer Childress, who was on car patrol duty and in uniform at the time, was directed by radio to pick up Maxwell. He went to the Maxwell home. The defendant's mother, then age 38, answered his knock. He told her he wanted to talk to William. She let him enter, checked to see if her son was in, and led Childress to the bedroom occupied by Maxwell and two younger sons. Childress told Maxwell he wanted to talk to him down town and asked him to dress. Childress testified that Maxwell went to the closet for clothes that were hanging there in a wrapper, and that he asked him "to put on these other clothes here that he had on". The latter were wet. Maxwell testified that he was told to put on the clothes he had on that night, that he went to the closet to get these, that he was then told to put on the clothes folded on the chair, that he was going to takes those clothes to the cleaners, and that they were not his.

Maxwell was taken to the hospital and before the victim. She at first did not identify him as her attacker but witnesses described her as visibly disturbed and shaking when he stood before her. She later said she had recognized him but feared for her life if she identified him. Maxwell was taken from the hospital to the police station.

Both sides admit that the exact times and place of Maxwell's arrest "is not entirely clear from the record".

It might have been at the home at about four a.m. or shortly thereafter at the hospital.

Captain Crain, with Officer Timms, went to the Maxwell home about five a.m. to get, as he testified at the habeas corpus hearing, "some more clothes that we thought might help us in our investigation of this case" or, as he testified at the trial, "I was looking for a particular object . . . I wanted what he was wearing that night". They had no search warrant. Mrs. Maxwell permitted them to enter. They were in uniform. The testimony is in conflict as to whether Mrs. Maxwell was then informed of any charge against her son; Crain said he so advised her but she stated, "He didn't say nothing about no rape case". (The district court found she had been so advised). She directed the officers to the clothes closet. The blue coat in question was obtained from that closet. It was eventually sent to the FBI laboratory. At the trial there was expert testimony that fibers in the coat matched others found on the victim's pajamas and on part of a nylon stocking picked up near the scene of the crime, and that fibers in the pajamas matched those found on the coat.

Mrs. Maxwell was understandably upset at the times the officers called at her home. In the margin we quote her testimony as to both the first call[12] and the second

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[12] ". . . it was late and I was asleep and someone knocked on the door and I woke up and I asked who was it and he said the policeman and I went to the door to let him in. He asked me did I have a son here by the name of William and I told him yes and he just come on in, he didn't have a search warrant or anything and I let him. I didn't know any better myself but I—I didn't know that he—you know, everything was all right, my children were at home and all and I just let him in."

call.[13] Maxwell's father worked at night and was not home when the officers called.

At the habeas corpus hearing Maxwell admitted that he had been adjudged guilty of two counts of petit larceny in 1958 and of federal post office charges in the same year.

We thus have a situation where the Maxwell home was twice visited by officers within two hours after the very crime was committed, where the second visit was within an hour of the first, where the officers were in uniform, where they were permitted access to the home by the mother, where on the second visit she pointed out the closet where the coat was, and where the accused, with his brothers, was still living with his parents in that home.

The district court held, pp. 209-211 of 229 F.Supp., that the taking of the coat violated no Fourth Amendment rights of Maxwell because his mother freely gave her consent and had the authority so to consent and because, upon all the circumstances, any search and seizure here was reasonable.

The parties are agreed, of course, that the Fourth Amendment's restraints against unreasonable searches and seizures are now applicable to the states under the due process clause of the Fourteenth Amendment and are to be measured by standards which govern federal cases, *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Ker* v. *California*, 374 U.S. 23, 33 (1963); *Aguilar* v. *Texas*, 378 U.S. 108, 110 (1964); *Linkletter* v. *Walker*, . . . U.S. . . . (1965),

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[13] "I opened the door and I was afraid to not let them in because—you know—when they said they were police officers—well, you just—I've just always—I just let the police officers in because I just feel like he is for peace and all, and I just—I don't know, I didn't know anything—I never been in anything like this and I just let them in and I still didn't think anything, didn't any of those officer have any search warrant or anything, didn't show me anything like that."

and that the Fifth Amendment's guaranty against self-incrimination, through the Fourteenth, is also applicable to the states and upon federal standards.[14] *Malloy* v. *Hogan,* 378 U.S. 1, 8, 11 (1964).

The parties are not in agreement, however, as to whether what was done here was incident to a lawful arrest, see *Preston* v. *United States,* 376 U.S. 364 (1964), or, if not, as to whether it was justified because of emergency or exceptional circumstances. We pass these issues and move on to the questions whether there was a consent by Mrs. Maxwell and, if so, whether her consent was a curative factor.

Although a consent freely and intelligently given by the proper person may operate to eliminate any question otherwise existing as to the propriety of a search, *Honig* v. *United States,* 208 F.2d 916, 919 (8 Cir. 1953); *Burge* v. *United States,* 332 F.2d 171, 173 (8 Cir. 1964), cert. denied 379 U.S. 883; *Burnside* v. *Nebraska,* . . . F.2d . . . (8 Cir. 1965), the defense argues that there is a presumption that a consent is coerced unless proved otherwise by the government and that the facts here—the early morning calls at the Maxwell home, the presence of men clothed with the uniform of authority, the confrontation of a Negro mother by white police, and her obvious concern

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[14] The Fifth-Fourteenth Amendment argument as to self-incrimination, although possibly embraced in the language of the first amendment to the petition for writ of habeas corpus (where it was alleged that the police searched Maxwell's room "and obtained clothing belonging to petitioner without a search warrant, without the consent of petitioner and without the consent of petitioner's parents"), was apparently not pressed before the district court and is really asserted for the first time only on this appeal. Because of this we could choose to ignore it here. *Sutton* v. *Settle,* 302 F.2d 286, 288 (8 Cir. 1962), cert. denied 372 U.S. 930; *Huntington* v. *Michigan,* 334 F.2d 615, 616 (6 Cir. 1964); *Trujillo* v. *Tinsley,* 333 F.2d 185 (10 Cir. 1964). But this is a capital case and, without our doing so regarded as a precedent, we consider this point on the merits.

and confusion—"militate against finding voluntary consent".

We recognize that it has been said that the government has the burden to establish the legal sufficiency of a consent. *Judd* v. *United States*, 190 F.2d 649, 651 (D.C. Cir. 1951); *United States* v. *Page*, 302 F.2d 81, 83-84 (9 Cir. 1962). Nevertheless, the existence and voluntariness of a consent is a question of fact. *United States* v. *Page*, supra, p. 83 of 302 F.2d. And Judge Young specifically found that there was a consent here and that it was voluntary. We cannot say that his finding was either erroneous or unsupported by substantial evidence. *United States* v. *Page*, supra, p. 85 of 302 F.2d; *Davis* v. *United States*, 328 U.S. 582, 593 (1946); *United States* v. *Ziemer*, 291 F.2d 100, 102 (7 Cir. 1961), cert. denied 368 U.S. 877; *McDonald* v. *United States*, 307 F.2d 272, 275 (10 Cir. 1962). The record clearly discloses no concealment of identity, no discourtesy, no abuse or threat, and no ruse or force exerted by the officers. It contains testimony that Mrs. Maxwell showed and directed them to the closet where her son's clothes were. On cross-examination she herself conceded that she permitted the officers to enter and to obtain the coat. She fully cooperated. She and her husband were both present throughout the state court trial, sat with their son at the counsel table, and heard, with no indication of opposition, the testimony of the officers as to how the coat was obtained with her permission. All this adequately supports the court's finding of voluntary consent. *Roberts* v. *United States*, 332 F.2d 892, 897 (8 Cir. 1964). The factual situation is different than that of *Pekar* v. *United States*, 315 F.2d 319, 325 (5 Cir. 1963), urged by Maxwell here, or the implied coercion

referred to in *Amos* v. *United States*, 255 U.S. 313, 317 (1921).

What, then, is the effect of this voluntary consent on the part of Maxwell's mother? We recognize, of course, that constitutional rights are not to depend upon "subtle distinctions, developed and refined by the common law in evolving the body of private property law". *Jones* v. *United States*, supra, 362 U.S. 257, 266 (1960). But this is not a case of property right distinctions. The defense concedes that Mrs. Maxwell possessed a proprietary interest in the house; that Maxwell himself only shared a room there with his two younger brothers; and that no landlord-tenant relationship existed between Maxwell and his parents. Mrs. Maxwell had control of the premises, undiminished by any kind of a less-than-fee interest possessed by Maxwell. This fact stands in contrast to the hotel or rental situations.[15] See *Stoner* v. *California*, 376 U.S. 483 (1964); *United States* v. *Jeffers*, 342 U.S. 48 (1951); *Lustig* v. *United States*, 338 U.S. 74 (1949); *Chapman* v. *United States*, 365 U.S. 610 (1961); *McDonald* v. *United States*, 335 U.S. 451 (1948); *Klee* v. *United States*, 53 F.2d 58 (9 Cir. 1931). The situation strikes us as being no different, factually, than if Mrs. Maxwell herself had brought the coat, it being properly in her possession, to the authorities. They came to the home, it is true, but they obtained the coat by freely allowed access to the house, by freely given directions as to its location, and by freely permitted acquisition of it by the officers and departure with it in their hands. *Roberts* v. *United States*,

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[15] But even in these situations abandonment (not present here) while the rental term is not yet expired overcomes any obstacle presented by a rental relationship. *Abel* v. *United States*, 362 U.S. 217, 240-41 (1960); *Feguer* v. *United States*, 302 F.2d 214, 248-49 (8 Cir. 1962), cert. denied 371 U.S. 872; *Roberts* v. *United States*, 332 F.2d 892, 898 (8 Cir. 1964).

supra, 332 F.2d 892, 896-97 (8 Cir. 1964); *Burge* v. *United States*, 342 F.2d 408, 413-14 (9 Cir. 1965); *Rees* v. *Peyton*, 341 F.2d 859, 861-63 (4 Cir. 1965); *United States* v. *Guido*, 251 F.2d 1, 3-4 (7 Cir. 1958), cert. denied 356 U.S. 950; *Woodard* v. *United States*, 254 F.2d 312 (D.C. Cir. 1958), cert. denied 357 U.S. 930; *Fredrickson* v. *United States*, 266 F.2d 463, 464 (D.C. Cir. 1959); *Morales* v. *United States*, . . . F.2d . . . (9 Cir. 1965); *United States ex rel. McKenna* v. *Myers*, 232 F.Supp. 65, 66 (E.D. Pa. 1964). See *United States* v. *Maroney*, 220 F.Supp. 801, 805-06 (W.D. Pa. 1963); *Gray* v. *Commonwealth*, 198 Ky. 610, 249 S.W. 769 (1923); *Irvin* v. *State*, . . . Fla. . . . , 66 So.2d 288, 293 (1953), cert. denied 346 U.S. 927.

But the defense argues that this coat was Maxwell's personal effect and clothing; that it could not be picked up or acquired in any manner, even with a valid search warrant, without his consent; and that it was evidentiary material not the proper subject of a search. *Gouled* v. *United States*, 255 U.S. 298 (1921) and *Holzhey* v. *United States*, 223 F.2d 823 (5 Cir. 1955) are particularly cited.

Whatever force might otherwise lie in the facts that the coat was clothing personal to Maxwell (and thus presumably an "effect" within the meaning of the Fourth Amendment), that it was not contraband or an article the possession of which is illegal, or an instrumentality or fruit of the crime, or capable of possible use to effect his escape, see *Harris* v. *United States*, 331 U.S. 145, 154 (1947); *United States* v. *Lefkowitz*, 285 U.S. 452, 463-66 (1932); *Agnello* v. *United States*, 269 U.S. 20, 30 (1925); *Honig* v. *United States*, supra, pp. 919-20 of 208 F.2d, this argument overlooks the consent to the officers' acquisition of the coat by a person having the proprietary interest in the premises where it was. If there was a search here at

all, it was not a general search and certainly it was not a search violative of a locked container or the like. *Roberts* v. *United States*, supra, p. 898 of 332 F.2d. Compare *United States* v. *Blok*, 188 F.2d 1019, 1021 (D.C. Cir. 1951); *Holzhey* v. *United States*, supra, p. 826 of 223 F.2d. It was an item which freely came into the hands of the authorities by one who had the right to make it available to them. See *Haas* v. *United States*, 344 F.2d 56, 57-60 (8 Cir. 1965), where this court upheld the seizure, in a search pursuant to a lawful arrest, of a defendant's grey suit which fit the description of clothing worn by a bandit and *Irvin* v. *State*, supra, p. 293 of 66 So. 2d. Compare *Williams* v. *United States*, supra, 263 F.2d 487.

The situation therefore appears to us to be one not involving any unreasonable search or seizure within the prohibition of the Fourth, Fifth, and Fourteenth Amendments. Reasonableness, after all, is the applicable standard. *United States* v. *Rabinowitz*, 339 U.S. 56, 63 (1950); *Sartain* v. *United States*, 303 F.2d 859, 862-63 (9 Cir. 1962), cert. denied 371 U.S. 894.

Neither are we impressed with any suggestion that the testimonial references to the coat were in any way a further violation of Maxwell's right not to be compelled physically to be a witness against himself, within the meaning of the Fifth and Fourteenth Amendments. The description of the coat and what was found on it was objective evidence from the mouths of witnesses who saw or who investigated. The coat is in no different category than the contours of Maxwell's face, the color of his hair, the description and the nature and condition of the clothes he wore, and his very size and color. *Holt* v. *United States*, 218 U.S. 245, 252-53 (1910); *Caldwell* v. *United States*, 338 F.2d 385, 389 (8 Cir. 1964).

Opinion of Court of Appeals

The district court's denial of the petition for habeas corpus is therefore affirmed. Where life is concerned a conclusion of this kind may involve a personal reluctance for judges. We deal, however, with statutory provisions which are not our province, at least not yet (see *Rudolph* v. *Alabama*, supra, 375 U.S. 889), to change. Maxwell's life therefore must depend upon different views entertained by the Supreme Court of the United States or upon the exercise of executive clemency.

Rives, dissenting:

I agree with the disposition made in the majority opinion of appellant's assignments of error 1 and 2, as raised in this appeal.

I cannot agree with the ruling and disposition made in respect to assignment of error 3, i.e. the search and seizure issue. . . the taking of appellant's "coat" from his place of abode by police officers under the factual circumstances related in the majority opinion.

As I view the facts in the majority opinion and those appearing in *Maxwell* v. *State*, 370 S.W.2d 113 (Ark., 1963); and *Maxwell* v. *Stephens*, 229 F.Supp. 205 (E.D. Ark., 1964), I think it is readily apparent that the search of appellant's place of abode and seizure of his "blue coat" were made under factual circumstances which reveal the same to be in violation of his Fourth Amendment rights made obligatory on the States by the Fourteenth Amendment to enforce.

I find fortification for that conclusion from the opinion and decision of the Court of Appeals of Kentucky, as made in *Elmore* v. *Commonwealth* (Ky.), 138 S.W.2d 956 (1940), where that Court considered a factual situation in

a rape case, which are on all fours with those appearing in the case at bar and ruled the seizure there made to be unlawful under federal constitutional standards.

In adjudging the validity of the search and seizure issue here, the starting point begins with appellant's arrest. Hence I consider the constitutionality thereof must be measured by a consideration of the following facts:

When Police Officer Childress first went to appellant's home he did so for the purpose of taking appellant into custody. At that time he told appellant, "he (Childress) wanted to talk to him downtown, and asked him to dress . . ." and "to put on (the) clothes he had on" previously that night, "which were wet." Under compulsion of Childress' command, appellant dressed. I find no reasonable ground for hesitancy in determining Maxwell was then placed under arrest. cf. *State* v. *King*, 84 N.J. Super. 237, 201 A.2d 758. Concededly, no search was then made by Officer Childress to seize appellant's coat incident to his arrest.

That appellant did not voluntarily leave his home in company with Officer Childress is manifest, cf. *Judd* v. *United States*, 190 F.2d 649 (D.C. 1951).

One or two hours thereafter, Capt. Crain and Officer Timms went to the Maxwell home, without a search warrant, and took possession of appellant's "blue coat" under circumstances as related in the majority opinion. The conversation those two police officers then had with appellant's mother does not raise a question of credibility. The only issue presented thereby is whether "consent" as claimed by the State was freely given to those officers to search the Maxwell home, and whether appellant's mother had power of possession to release appellant's personal belongings to the custody of such officers.

I do not consider the conversation appellant's mother had with Capt. Crain and Officer Timms to have any probative value in making a determination of the validity of the search and seizure made by those officers. Mere acquiescence in the apparent authority of a police officer is not usually considered consent. cf. *Dukes* v. *United States,* 275 Fed. 142 (4 Cir., 1921); *United States* v. *Marquette,* 271 Fed. 120 (N.D. Calif., 1920). What was then said by appellant's mother "was but showing her respect for and obedience to the law and she was not consenting to the search regardless (of lack of a) search warrant." *Stroud* v. *Commonwealth* (Ky.), 175 S.W.2d 368, 370, citing *Amos* v. *United States,* 255 U.S. 313 (1921); and *Elmore* v. *Commonwealth, supra.* As the majority opinion notes, the validity of arrest and search and seizure here must be determined by reasonableness in light of the particular circumstances revealed. I consider the factual circumstances in the case at bar reveal "implied coercion."

Admittedly, the coat that was seized was the personal property of appellant. Being under arrest at the time he was taken from the place of his abode, where the coat was then situate, the only reasonable inference is that he did not voluntarily place possession of his coat in his mother or anyone else. No one can waive his constitutional right to assert his right of possession thereof. The search here made was not incident to his arrest. To be legal, the seizure of appellant's coat could only have been validly made without a search warrant at the time appellant was arrested by Officer Childress. His other clothing was so seized.

Respondent's argument that this search and seizure was lawful because of possible destruction of evidence, and "inability to secure issuance of a search warrant," is hol-

low, indeed. Appellant was then under arrest. There is no evidence that his mother had any knowledge that his coat might be material to any offense for which her son was arrested. The only possible inference I can make is that she first gleaned knowledge of the cause of his arrest from Capt. Crain or Officer Timms during the time the illegal search and seizure here considered was made. It is not contended that Childress told her why appellant was being taken "downtown". cf. *Foster* v. *United States* (8 Cir., 1960), 281 F.2d 310.

I would reverse the judgment below.

Opinion of District Court

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

PINE BLUFF DIVISION

No. PB 64 C 4

WILLIAM L. MAXWELL,

Petitioner,

—v.—

DAN D. STEPHENS, Superintendent of Arkansas State Penitentiary,

Respondent.

MEMORANDUM OF OPINION

This habeas corpus proceeding is brought by William L. Maxwell, a Negro male, age 24, who was convicted for the crime of rape in the Circuit Court of Garland County, Arkansas, on March 21, 1962, and sentenced to death. The conviction was affirmed by the Arkansas Supreme Court in the case of Maxwell v. State, 236 Ark. 694, 370 S.W.2d 113 (1963), and following a denial of petition for rehearing the date of execution was scheduled for January 24, 1964. No application for certiorari was made to the United States Supreme Court. The instant action was filed on January 20, 1964, alleging that the state court conviction was obtained in violation of petitioner's constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution. Petitioner was permitted to amend

his petition twice and a hearing was held on the petition, as amended, on February 12, 1964, as well as on February 27, 1964, at which time the testimony was concluded. Petitioner and respondent have submitted briefs in support of their respective contentions.

Throughout the state court proceedings, petitioner was represented by Mr. Christopher C. Mercer, Jr., a capable attorney experienced in this type of litigation.[1] Subsequent to the state court proceedings, and prior to this action, petitioner obtained the services of his present counsel who now represent petitioner in this habeas corpus proceeding. The question of Maxwell's guilt is not now before this court. Cf. Henslee v. Stewart, 311 F.2d 691 (8th Cir. 1963); Bailey v. Henslee, 287 F.2d 936, 939 (8th Cir. 1961). The circumstances of the crime and the evidence against Maxwell are fully discussed by the Arkansas Supreme Court in Maxwell v. State, supra, 236 Ark. 696-700, 370 S.W.2d 114-116. The only issue which now confronts this court is whether Maxwell's federal constitutional rights, in the particulars relied upon, were preserved in the state court action.

The alleged violations of petitioner's constitutional rights, in substance, are that: (1) Petitioner was illegally arrested and there was an unlawful search and seizure of his home and person; (2) Petitioner was tried in a hostile atmosphere; (3) Racial discrimination was practiced in the selection of the jury which tried petitioner; (4) There has been an unconstitutional application and enforcement of Ark.Stat. § 41-3403 (1947) against petitioner, and the death

[1] Mr. Mercer is a graduate of the University of Arkansas School of Law and was one of the attorneys who represented Lonnie Mitchell in a habeas corpus proceeding. Mitchell v. Henslee, 208 F.Supp. 533 (E.D.Ark. 1962) rev'd per curiam Case No. 17,208, 332 F.2d 16 (8th Cir. May 4, 1964).

penalty upon conviction for rape provided by this statute is a "cruel and unusual" punishment contrary to the basic concepts of a civilized society. In this opinion, the Court will deal with these issues in the order mentioned.

I. The Arrest and Search

The offense with which petitioner was charged occurred about three o'clock in the morning of November 3, 1961. Approximately one hour later, petitioner was taken into custody by police officers at his parents' home where he lived. This was done on the basis of information and descriptions given by the victim to a Negro police officer, O. D. Pettis, now deceased. Sometime around five o'clock that morning police officers Captain Crain and Officer Timms made a trip back to petitioner's home in order to obtain some clothing belonging to petitioner allegedly worn during the commission of the offense; and another trip was made by Office Timms later that same morning in order to obtain a change of clothing for petitioner since arrangements had been made for the clothes allegedly worn by petitioner during the rape, and which petitioner put on when taken into custody, to be sent to the laboratory of the Federal Bureau of Investigation in Washington, D. C.

When petitioner was taken into custody he was viewed by the victim at a local hospital and subsequently identified as the assailant. Thereupon, petitioner was incarcerated in the City Jail and held until later during the afternoon or evening of November 3rd, when he was taken to the County Jail in nearby Malvern, where petitioner remained until November 6th. Petitioner signed a written confession while at the County Jail in Malvern and made another confession later in Hot Springs. Petitioner was then returned to the city of Hot Springs, where on November 7, he was

formally charged by information with the crime of rape under Ark.Stat. § 41-3401 (1947).

No warrant for petitioner's arrest was issued prior to November 7th when petitioner was formally charged, and a warrant to search petitioner's home was never procured. On November 3rd, while petitioner was held at the Hot Springs City Jail, police officers combed petitioner's hair and obtained a nylon thread from his hair, as well as a specimen of his hair. The police officers obtained clothing from petitioner's person, as well as his home. Petitioner was not permitted to see his parents or a lawyer, and according to petitioner, he was mistreated and coerced into signing a confession. Petitioner now argues that the arrest, and the search of his person and home were illegal and constitute a violation of his constitutional rights.

(a) *Petitioner's Arrest Without A Warrant*

[1] The lawfulness of petitioner's arrest without a warrant must be determined by the law of Arkansas, subject to the test of reasonableness under the Fourth and Fourteenth Amendments to the United States Constitution. Ker v. California, 374 U.S. 23, 40, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1962). In Arkansas, it is provided by statute that an arrest without a warrant is authorized where the arresting officer has reasonable grounds for believing that the person arrested has committed a felony. See Ark.Stat. § 43-403 (1947). The Arkansas Supreme Court has held that where a felony has in fact been committed, an arrest without a warrant may be made where the officer has reasonable grounds to suspect the particular person arrested. Carr v. State, 43 Ark. 99 (1884). Knight v. State, 171 Ark. 882, 286 S.W. 1013 (1926). Lane v. State, 217 Ark. 114, 229

S.W.2d 43 (1950). Trotter and Harris v. State, 237 Ark. 820, 377 S.W.2d 14 (1964).

At the time of petitioner's arrest, the fact that a felony had been committed was clearly established. Miss Stella Spoon had been brutally raped and her 90 year old father with whom she resided had been mercilessly struck and left bleeding when he attempted to aid her. Miss Spoon had given a description of her assailant to Officer Pettis, the Negro city policeman, and had further told him that her assailant had said that his name was "Willie C. Washington".[2] The first suspects brought to the hospital for Miss Spoon to identify were Willie C. Washington, Sr., Willie C. Washington, Jr., and another Negro. Miss Spoon told Officer Pettis that none of these individuals was her assailant, but she gave Pettis some additional descriptions which she was better able to do by comparison of her attacker with Willie C. Washington, Jr. Officer Pettis then indicated to Miss Spoon and the other policemen in her room that he knew the identity of her assailant. Petitioner was then taken into custody and was the next person brought to Miss Spoon's hospital room for her to identify. When petitioner was brought into Miss Spoon's hospital room, according to the testimony of Officer Timms at the state court trial, Miss Spoon " * * * started shaking and drawing herself up and shaking real bad," [3] but she did not then identify petitioner as her attacker. When asked by petitioner's counsel in the state court trial why she did not immediately in her room identify petitioner as her assailant, Miss Spoon responded: "Because I had been

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[2] The details of the identification are set out in the transcript of Miss Spoon's testimony taken at the hearing on the habeas corpus proceeding. See also Record, Vol. II, pp. 286-290, Maxwell v. State, 236 Ark. 694, 370 S.W.2d 113 (1963) (hereinafter cited as State Court Record).

[3] State Court Record, Vol. II, pp. 312 and 313.

threatened, my father had been threatened. I don't know legal procedure, I didn't know whether they could hold him or not, and if he happened to break and get loose or something, he would do like he said he would, just get a gun and come back and kill us. I didn't know how long I was going to stay in that hospital." [4] On direct examination, Miss Spoon testified that there was not any possible doubt in her mind that petitioner was her attacker.[5]

[2] The conclusion is compelling that petitioner was arrested with reasonable cause and that therefore the arrest without a warrant was lawful under the circumstances. The police were benefited by a description given by Miss Spoon as to the size, complexion and clothes of her assailant. Officer Pettis was undoubtedly familiar with the Negro community. He had seen petitioner that night on the avenue and his description matched the one given by Miss Spoon. Petitioner, known to the police as "Plunk", had previously experienced difficulties with the police, and petitioner personally knew Officer Pettis. His home was near the place of attack, as well as the victim's home.

(b) *The Search of Petitioner's Person*

[3, 4] It is settled law that a search of the person or premises incident to a lawful arrest is permissible. Preston v. United States, 84 S.Ct. 881 (1964). Ker v. California, supra. Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1948). United States v. Iacullo, 226 F.2d 788 (7th Cir. 1955). See also Commonwealth v. Holmes, 344 Mass. 524, 183 N.E.2d 279 (1962), and cases collected in Annot., 89 A.L.R.2d 715, 780-801 (1963). Since

[4] State Court Record, Vol. II, p. 280.
[5] State Court Record, Vol. II, pp. 263, 264, and 268.

the arrest without a warrant was lawful under the circumstances, it follows that the evidence obtained from the clothes removed from petitioner's body and the thread and hair taken from petitioner's head were not illegally obtained. See United States v. Iacullo, supra, 226 F.2d at 792, discussing United States v. Di Re, 332 U. S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948); and Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1958). United States v. Cole, 311 F.2d 500 (7th Cir. 1963), cert. denied 372 U.S. 967, 83 S.Ct. 1092, 10 L.Ed.2d 130 (1963).

The items obtained from petitioner at the Hot Springs City Jail, *i. e.*, a hair from his head, a strand of nylon thread found in his hair, and his clothing, were necessary to a thorough investigation of the offense with which petitioner was charged and the obtaining of these items in the course of the investigation was a reasonable procedure under the circumstances. According to Miss Spoon's report, her attacker had worn a nylon stocking on his head which came off as the attacker attempted to pull it over his face. The police had found a nylon stocking near the victim's house in the vicinity where the attack had occurred. Furthermore, the clothing worn by petitioner had seminal stains, as well as blood stains. These items, along with others, were sent to the Federal Bureau of Investigation laboratories in Washington, D. C., for scientific analysis.

(c) *The Search of Petitioner's Home*

Petitioner argues that the police officers conducted an illegal search and seizure in obtaining a blue coat from his home after petitioner was arrested. The coat was obtained by Captain Crain from petitioner's mother and it was used as evidence in the state court trial. (Certain clothes obtained by Officer Timms from petitioner's mother

on a second trip back to the house were merely a convenient change of clothes for the ones obtained from petitioner at the City Jail and were not used as evidence.) Admittedly, the blue coat was obtained without a search warrant.

In the state court trial, Captain Crain testified that he obtained the coat with the permission of petitioner's mother, and this was not disputed at the state court trial despite the fact that petitioner's mother was in the court room and heard this testimony.[6] At the hearing on the instant petition, Captain Crain again testified that he explained to petitioner's mother that he wished to get the clothes worn by petitioner that night and that she took him to petitioner's room and showed him the closet where the coat was hanging. Captain Crain informed petitioner's mother that petitioner had been accused of committing rape. Petitioner's mother, age 40, testified that petitioner lived there with his parents and occupied a room with his two brothers. At the time of the search, petitioner's father was at work and petitioner's two brothers were in bed asleep. Petitioner's mother further stated in substance at the hearing on the instant petition that she did not know anything about a search warrant and did not object to the police coming into her home since she did not think anything was wrong and there was no reason not to cooperate. On cross-examination, petitioner's mother stated: "I didn't never say that I didn't grant permission."

The evidence not only reflects that petitioner's mother freely and voluntarily consented to the police officer taking the coat, but she also cooperated with the officer to the extent that she showed the officer where the coat was lo-

[6] State Court Record, Vol. II, pp. 333 and 334.

cated. The coat was obtained less than an hour after petitioner was arrested. The search itself was not a general exploratory search of the entire house, nor was it a rigorous search. The police officer simply requested to see the clothes which petitioner had worn that night and petitioner's mother permitted the police to enter her house and accompanied the police to petitioner's room and directed them to the closet. The analysis made by the Federal Bureau of Investigation at the laboratory in Washington, D. C., established that the blue-black woolen fibers in the nylon stocking found near Miss Spoon's house, as well as the blueblack fibers found in Miss Spoon's pajamas, came from this coat taken from the closet.[7]

[5-7] Of course, petitioner's state court conviction cannot be based upon evidence obtained in violation of the Fourth Amendment to the United States Constitution and contravening the Fourteenth Amendment due process clause. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). However, the protection of the Fourth Amendment prohibits only those searches which are "unreasonable". United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950); and a search and seizure are not deemed to be unreasonable and therefore unlawful if based upon a valid consent freely and understandably given. Foster v. United States, 281 F. 2d 310 (8th Cir. 1960). See also United States v. Roberts, 223 F.Supp. 49 (E.D.Ark.1963). Yet, ultimately, the reasonableness of any search depends upon the facts and circumstances of each case. United States v. Rabinowitz, supra, 339 U.S. at 63, 70 S.Ct. 430, 94 L.Ed. 653.

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[7] State Court Record, Vol. II, p. 359.

It would unduly burden this opinion to attempt to analyze the many cases involving consent to a search and seizure of property or evidentiary material. These cases are fully discussed by Chief Judge Henley in United States v. Roberts, supra, 223 F.Supp. at 58 and 59, in which the court observes that there is no hard and fast rule but rather the determination in each case is based upon a consideration of all of the surrounding facts and circumstances, including the validity of the consent. Only recently, the United States Supreme Court in Stoner v. California, 84 S.Ct. 889 (1964) rejected the argument that the search of a hotel room, although conducted without the consent of the accused, was lawful because it was conducted with the consent of the hotel clerk. Similarly, the Supreme Court has refused to permit the unlawful search of a hotel room to rest upon the consent of the hotel proprietor, Lustig v. United States, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949), or a hotel manager, United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951); and a search of a tenant's room with the consent of the owner of the house has been held unconstitutional, Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961), as well as a search of an occupant's room in a boarding house, McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948). However, all of these cases are distinguishable from the instant case in which petitioner merely shared a room with his two brothers in his parents' home.

In Stoner v. California, supra, the Supreme Court discussed the argument that the search of the defendant's room was justified by the hotel clerk's consent and concluded:

> "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here,

> and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. It is true that the night clerk clearly and unambiguously consented to the search. *But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room.*" (emphasis added)

[8] The evidence adduced at the hearing on this petition, as well as the record from the state court trial, clearly and positively establishes that petitioner's mother freely, voluntarily, intelligently and understandingly consented to and authorized the search made by Captain Crain to obtain the blue coat. The search was made in her home at a time when the premises were under her sole control and she had the right to exclude whomever she chose, even including the petitioner. Petitioner's mother had the authority to permit the police or anyone else to enter petitioner's room and examine the clothes in the closet. In the language of the Supreme Court in Stoner, the police did have a "basis * * * to believe that * * * [petitioner's mother] * * * had been authorized by the petitioner to permit the police to search the petitioner's room." This is true not because of any agency based upon the mother-son relationship, but rather because petitioner's mother, unlike petitioner himself, had the sole control, power and, at the time, the superior right to exclude others from not only her home but also from the very room which petitioner shared with his two brothers, and it was her free and voluntary choice to permit the police to enter and search the closet.

It is the holding of this Court that the blue coat taken by Captain Crain was obtained by a lawful search and seizure, and petitioner's contention to the contrary is rejected. However, the propriety of the search and seizure need not rest solely upon the consent given by petitioner's mother. The lawfulness of this search and seizure is based upon a consideration of all of the facts and circumstances surrounding the search and seizure which, in the opinion of the Court, establish that from a realistic and practical standpoint there was nothing unfair, unreasonable or oppressive in the conduct of the police in the performance of the search and seizure of the blue coat. The consent given by petitioner's mother, the demeanor and actions of Captain Crain in informing petitioner's mother of exactly what was sought, as well as informing her of the charge against petitioner, the orderly investigation of only the closet in her presence without any protest whatsoever—all of these things taken in the aggregate compel this Court to the conclusion that the police acted fairly and reasonably, and did not violate petitioner's constitutionally protected rights against an unreasonable search and seizure.

(d) *The Alleged Mistreatment and Coerced Confessions*

[9] It is true, as now argued, that when petitioner was taken into custody and incarcerated in the City Jail he was not permitted to see his parents or a lawyer. Maximum precautions were taken by the police primarily because the City Jail was a converted military jail which furnished poor security and there had been numerous escapes from this jail in the past. In fact, part of the jail was secured merely by a cyclone fence. Petitioner testified at the hearing on the instant petition that he was mistreated by the police officers and that he was coerced into making a con-

fession in Hot Springs, as well as one in Malvern. This statement that the confessions were coerced was sharply disputed by the testimony of the police officers. Neither confession was used as evidence in the state court trial and all of the evidence there relied on was obtained prior to the time when petitioner allegedly made either of the two confessions. Petitioner's conviction was in no way based upon any confession or information obtained therefrom. Therefore, any attempt to determine whether the confessions were voluntary is unnecessary.[8]

II. Adverse Atmosphere

[10] Petitioner relies principally on the testimony of Kenneth Adair to support the contention that the atmosphere which existed in Garland County prior to and during the trial was so hostile and adverse that petitioner did not receive a fair trial. Mr. Adair, a Negro newspaper publisher in the city of Hot Springs who followed petitioner's trial daily and who contributed funds for the bringing of this habeas corpus proceeding, testified that there was a "tense atmosphere and some talk of mob violence." Irving S. Stephenson, a Negro businessman and former Garland County jury commissioner called as a witness by respondent, also testified that there was an "adverse atmosphere". On the other hand, Darfus Henry, a Negro businessman who was one of the jury commissioners for the jury empaneled for the trial of petitioner's case in state court, testified that there was not a hostile atmosphere at the time.

In the state court proceeding, petitioner requested a change of venue on the alleged ground that he could not

[8] Neither of these confessions were introduced into evidence at the hearing on the instant petition.

obtain a fair and impartial trial in Garland County. Accordingly, a hearing was scheduled and Dan Wolf, Mayor of the City of Hot Springs, and Duffie Searcy, the Sheriff of Garland County, were called by petitioner to testify at the hearing, which was held pursuant to Ark.Stat. § 43-1502 (1947). Mayor Wolf, a resident of Hot Springs off and on for about thirty years, stated that he had talked to "both the colored people and the white people" in the area and it was his opinion that petitioner could get a fair and impartial trial in Garland County.[9] Similarly, Sheriff Searcy, a resident of Garland County for fifty-one years, stated that petitioner could get a fair and impartial trial in Garland County.[10] These were the only witnesses called to testify at the hearing, and the request for a change of venue was denied.

Obviously such a heinous crime as perpetrated against Miss Spoon would arouse some public sentiment. However, the evidence produced at the hearing on this petition falls far short of the contention now urged in this regard. Cf. Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 (1923). On the contrary, the undisputed evidence at the state court hearing established that petitioner could get a fair and impartial trial in Garland County, and the voluminous record of the state court proceeding reflects that petitioner did in fact receive such a trial.

III. Selection of the Jury

Petitioner contends that there was racial discrimination practiced in the selection of the jury which was empaneled to try his case in the state court. This argument was not raised at any time in the state court proceeding, notwith-

[9] State Court Record, Vol. I, p. 97.
[10] State Court Record, Vol. I, p. 102.

standing the fact that the record in this proceeding discloses the attorney who represented petitioner throughout the state court action, Mr. Chris Mercer, was well aware of the constitutional right against jury discrimination on the basis of race, and checked the jury list, ascertained the identity of the jury commissioners, knew the percentage of Negroes in the area, noticed some repeaters, knew about the racial designations on some of the names, was fully familiar with the practice of quashing jury panels on the ground of racial discrimination, and, in fact, discussed the jury panel with petitioner, and, further, filed several motions directed at other aspects of alleged unconstitutionality of the state court proceeding.

[11] It would reasonably appear that it was, in the language of Fay v. Noia, 372 U.S. 391, 439, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), the "considered choice" of petitioner deliberately not to raise this argument of jury discrimination, and, therefore, there was a waiver of the right to make this argument now. In Fay v. Noia, supra, 372 U.S. at 438 and 439, 83 S.Ct. 822, 849, 9 L.Ed.2d 837, the United States Supreme Court stated:

> "* * * The federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.
>
> "* * * If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, *whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state*

> *procedures,* then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. (citation omitted) At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. * * * " (emphasis added)

However, even assuming *arguendo* that petitioner has not waived the right to present this argument, it is the view of this Court that this argument that there was racial discrimination in the selection of the jury panel in petitioner's state court trial is without merit.

[12, 13] Petitioner's right to a trial by "impartial jury" is guaranteed, Ark. Const. Art. 2, § 10; and discrimination on the basis of race or ancestry in the selection of persons for service on grand or petit jury panels is clearly violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950). The question of whether or not racial discrimination has been practiced in the selection of a jury panel is a question of fact, and it is the duty of a federal court to make independent inquiry into such alleged discrimination and determine whether a federal right has been denied. Bailey v. Henslee, supra, 287 F.2d at 943.

In Bailey v. Henslee, supra, Judge Blackmun discussed at length the alleged jury discrimination practiced in Pulaski County Circuit Court, enumerating some nine factors, and, on page 947 of 287 F.2d concluded:

"* * * Here there appears to be a definite pattern of race selection; here there is a device for race identification with its possibility of abuse; here there is exclusion from the alternate panels and from the special panels actually used; here there is an element of recurrence of the same Negro names; and here there is the additional factor, for what atmosphere it may provide, of exclusion from the civil divisions' panels."

It is the position of petitioner that the "racial discrimination in the selection of jurors in Garland County, Arkansas, presents a stronger case than the evidence presented in the Bailey case."

Few, if any, of the items enumerated by Judge Blackmun in Bailey appear in the selection of the jury which tried petitioner in state court. The regular jury panel present for the trial consisted of 27 people, two of whom were Negroes, and the alternate panel present also consisted of 27 people, seven of whom were Negroes. All of these jurors had been selected by three capable jury commissioners: Mr. Jeff Davis Bradley, a lifelong resident of Garland County and grocer in a rural community; Mr. Wayne R. Chitwood, a lifelong resident and local businessman who operated an automobile agency; and Mr. Darfus Henry, a local Negro businessman who operated a barber shop in the Negro business district of the City of Hot Springs. There had always been at least one Negro jury commissioner for the past few years.

According to the testimony of Mr. Darfus Henry, the Negro Jury Commissioner, the jury panel which served at petitioner's trial, and which was selected for the September 1961 term of the Garland County Court approximately two months before the crime was committed, was selected

by each jury commissioner making a list of names of persons who in the judgment of the respective jury commissioner were suitable for jury service.[11] The jury commissioner then checked the lists of names against the poll tax books in order to determine whether or not the prospective jurors were qualified voters.[12] Finally, the lists were checked against a list of jurors who had served within the past two years to make sure that they were not disqualified to serve for that reason.[13] Mr. Henry stated that he selected some of the Negroes on the jury panel and the other commissioners selected some more. This testimony was corroborated by the other two jury commissioners, Mr. Bradley and Mr. Chitwood.

The jury commissioners testified that they did not recall that the poll tax book furnished them had any racial designation of electors, *i. e.*, the letter "c". While they apparently are in error about this fact,[14] it certainly seems that in the procedure used by them in selecting the jury panel it fairly appears that the racial designation did not affect in any way their selection of the jurors who served on the jury panels.

The petit jury list from petitioner's state court trial reflects racial designations by the letter "c" following the names of some, but not all, of the Negroes on the list. The jury commissioners testified that this designation was not made by them. Mr. Sherlon Hilliard, the Circuit Court Clerk, could not state positively that he had placed the racial designations on the list but he did testify that he

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[11] Qualifications of jurors are generally set out in Ark.Stat.Ann. § 39-101—39-116 (1947).

[12] Ark.Stat.Ann. § 39-101 (1947).

[13] Ark.Stat.Ann. § 39-225 (1947).

[14] Ark.Stat.Ann. § 3-227(b) (1947) requires the racial designation on the poll tax records.

often so designated the race of the jurors listed *after the lists were prepared* because he nearly always had requests from the local newspapermen, as well as attorneys, as to the Negro jurors on the panel.

The jury commissioners further testified that they each selected Negroes, along with other prospective jurors, whom they knew and felt would be suitable for jury service, but that they made no special effort to acquaint themselves with other Negroes of Garland County who may have been qualified to serve as jurors. Petitioner points to this fact as evidence of discrimination and cites Cassell v. Texas, supra, wherein Mr. Justice Reed stated at page 289 of 339 U.S., at page 633 of 70 S.Ct., 94 L.Ed. 839. "When the commissioners were appointed * * * it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors * * * *without regard to race and color.* * * * " (emphasis added)

Petitioner would lead this Court to believe that since the jury commissioners did not make a special effort to acquaint themselves with the qualified Negro electors, they did not discharge "their duty to familiarize themselves fairly with the qualifications of eligible jurors." This conclusion is a *non sequitur* since if the jury commissioners had singled out a particular group on the basis of race there clearly would have been a selection of jurors *with* regard to race instead of *without* regard to race. It is the view of this Court that in the selection of the jury empaneled to serve at the trial of petitioner's case, the language of Mr. Justice Reed in Cassell v. Texas, supra, was fulfilled to the letter and the spirit by the jury commissioners, Mr. Bradley, Mr. Chitwood and Mr. Henry, who each in their varied occupations had a wide acquaintance of Garland County, and by force of their varied occupa-

tions were reasonably familiar with the residents of Garland County, both those who were qualified electors and those not qualified; and, the Court is of the opinion that the jury commissioners did in fact select a jury panel "without regard to race or color".

It was clearly stated in Bailey by Judge Blackmun that "* * * Discriminatory selection in prior years does not nullify a present conviction if the selection of the jury for the current term is on a proper basis. 'Former errors cannot invalidate future trials.' [citing Brown v. Allen, 344 U. S. 443, 479, 73 S.Ct. 397, 418, 97 L.Ed. 469 (1953)]" Bailey v. Henslee, supra 284 F.2d at 943. However, in order to avail petitioner of every reasonable opportunity to establish the alleged jury discrimination, petitioner was permitted to introduce into evidence at the hearing on the instant petition copies of the jury records of Garland County, Arkansas, for the past 28 consecutive terms of the Garland County Circuit Court, dating from the March 1949 term to the September 1963 term. It would unduly burden this opinion to attempt to discuss in detail these records. It is the view of this Court that the exhibits summarizing these records do not establish the racial discrimination in the selection of the jury, as petitioner now argues.

[14] The figures compiled by petitioner, and quoted in his brief on page seven, indicate that almost 14% of the persons who served on the regular petit jury panels from March 1949 to September 1963 in the Garland County Circuit Court were Negroes. However, this figure is based on the number of Negroes so designated by race, and it is undisputed that not all Negro jurors were designated by race. Hence, even the figure of 14% represents slightly

less than the actual percentage of Negroes participating in jury service. Unlike many counties in Eastern Arkansas, Garland County is not heavily populated by Negroes. Petitioner established by the testimony of Mr. Floyd Bryan, an accountant in the Auditor's Office of the State of Arkansas, that the percentage of qualified Negro electors residing in Garland County has numbered from 10% to 11% over the years.

[15] Admittedly, proportional representation of races on a jury is not a constitutional requisite, Cassell v. Texas, supra at 286 of 339 U.S., 70 S.Ct. 629, 94 L.Ed. 839 and a disproportion in the number selected does not even establish racial discrimination in the selection of a jury. Bailey v. Henslee, supra, 287 F.2d at 942, citing Akins v. Texas, 325 U.S. 398, 403, 65 S.Ct. 1276, 89 L.Ed. 1692 (1945). Now, petitioner in support of his argument of jury discrimination urges this Court to consider statistics which reflect the proportionate number of Negroes available for jury service in comparison with the proportionate number of Negroes who actually served as jurors, *i. e.*, 10%—11% :14%. In short, a far greater proportion of qualified Negroes have served as jurors in Garland County for the past 28 consecutive terms of court than actually, in fact, reside there. Obviously, it does not follow from these statistics that Negroes have been racially discriminated against in the selection of jurors during this period.

Petitioner further argues that from these records covering 28 consecutive terms of court, there is a recurrence of Negroes on the juries, and this evidence of "repeaters" establishes a pattern of limiting the participation of Negro electors for jury duty. Undoubtedly, over a period of 28 consecutive terms there might be a recurrence of some

individuals serving as jurors, particularly in a county no larger than Garland County.[15] The fact that Mr. Darfus Henry, as well as Mr. Emmett Harris, served as a juror for three terms over his period of approximately fourteen years, and further that some Negroes from the same immediate family were called during the same term do not establish, as petitioner contends, any pattern of limiting the Negro participation in jury service. Petitioner has failed to furnish an accurate picture of the existence of repeaters generally, assumming there are others, as compared to Negro repeaters; and hence the significance, if any, of petitioner's statistics cannot be fairly determined. The proof falls far short of establishing what petitioner now argues in this regard.

IV. Alleged Unconstitutionality of the Arkansas Rape Statute

[16] Petitioner argues the unconstitutionality of the statute under which he was convicted. This statute, Ark. Stat. § 41-3403 (1947), provides in substance that any person convicted of rape shall suffer the punishment of death or life imprisonment. It is petitioner's contention that this statute has been so applied in Arkansas that Negro men who are convicted of rape upon white women "usually" receive the death sentence, whereas white men and Negro men who commit rape upon Negro women "usually" receive a lesser sentence than death. Thus, petitioner contends that Negro men are denied equal protection of the law, and cites Pace v. Alabama, 106 U.S. 583, 1 S.Ct. 637, 27 L.Ed. 207 (1882), and People v. Friedman, 341 U.S.

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[15] According to the statistics furnished by Mr. Floyd Bryan, an accountant employed in the State Auditor's office, the total number of qualified electors in Garland County was slightly less than 20,000 for each of the years 1957 and 1959.

907, 71 S.Ct. 623, 95 L. Ed. 1345 (1951), both of which were discussed briefly by the Arkansas Supreme Court when this argument was made on appeal and decided adversely to petitioner. Maxwell v. State, supra, 236 Ark. at 701 and 702, 370 S.W.2d at 117 and 118.

In the state court proceeding, prior to the trial, a hearing was held on petitioner's motion to declare Ark.Stat. § 41-3403 (1947) unconstitutional in its application. In support of its motion petitioner relied on the Arkansas State Penitentiary records of criminal executions from September 5, 1913 through October 28, 1960.[16] At the hearing held on the instant petition, petitioner was also permitted to introduce evidence from the Circuit Clerks, the Prosecuting Attorneys, and the Sheriffs of Garland, Jefferson, and Pulaski County, Arkansas, as to the number of rape prosecutions in these counties and the disposition of these prosecutions for the period of January 1, 1954, through January 1, 1964. Petitioner now relies on all of this evidence to establish the unconstitutionality of this statute, as alleged.

It would serve no useful purpose to discuss the exhaustive statistics compiled by petitioner regarding the rape prosecutions as shown by the records examined of the three counties. While the court records are complete, the information obtained from the prosecuting attorney's office and from the sheriff's office of these counties is not, due to the fact that such records for an extended period of time have not been preserved in these offices. However, considering all of the documentary evidence introduced by petitioner, as well as the testimony offered, and giving

[16] These statistics are detailed in the record and discussed fully by the Arkansas Supreme Court in Maxwell v. State, 236 Ark. 694, 701, 370 S.W.2d 113 (1963).

the petitioner every favorable inference reasonable from this evidence, it is the view of this Court that petitioner has failed to establish the unconstitutional application of Ark.Stat. § 41-3403 (1947).

[17] Assuming that it is true, as petitioner contends, that Negro men in these three counties for the period in question who were convicted for raping a white woman were sentenced to death, whereas white men and Negro men who allegedly raped Negro women were either not charged or given a lesser charge than rape, the fact remains that the choice of punishment in a capital case is within the province of the jury, Ark.Stat. Ann. § 43-2153 (1947). It is a matter of common knowledge that the legal defense of consent is always an obstacle to a rape prosecution and the moral character of the prosecuting witness is almost always in issue. The statistics compiled by petitioner represent a rather naive attempt to ascertain why a rape conviction was sought in one case and yet not in another. Petitioner apparently does not now contend that jury verdicts in rape prosecutions are based on racial discrimination, and there is certainly no evidence in the record to warrant this conclusion. On the contrary, each of the prosecuting attorneys called as a witness by petitioner stated under oath that they have prosecuted all cases, including charges of rape, without regard to race.

It is the view of this court that petitioner has failed to establish that Ark.Stat. § 41-3403 (1947) is unconstitutional in its application, as alleged. Ironically enough, petitioner and one Charles Franklin Fields, a white man whose conviction for the crime of rape under this statute was affirmed by the Arkansas Supreme Court in Fields v. State, 235 Ark. 986, 363 S.W.2d 905 (1963), were both scheduled to be executed at the Arkansas State Peniten-

tiary on January 24, 1964. Fields was executed on that day.

[18] Finally, petitioner has contended that the imposition of the death penalty on a charge of rape contravenes the Eighth and Fourteenth Amendments to the United States Constitution for the reason that such a penalty conflicts with the basic concepts of fairness and right to civilized societies. Petitioner relies solely on the dissenting opinion in the denial of certiorari by the United States Supreme Court in Rudolph v. Alabama, 275 Ala. 115, 152 So.2d 662 (1963), cert. denied 375 U.S. 889, 84 S.Ct. 155, 11 L.Ed.2d 119 (1963). Suffice it to say that the alleged unconstitutionality, on the theory advanced, must rest upon the pronouncement of the majority and not the dissent.

The petition will be denied.

Opinion of Supreme Court of Arkansas

WILLIAM L. MAXWELL,

Appellant,

v.

THE STATE OF ARKANSAS,

Appellee.

No. 5057

Supreme Court of Arkansas.

May 27, 1963.

OSRO COBB, Special Associate Justice.

1. This is a criminal case wherein appellant was charged, under Ark.Stat.Ann.1947, Sec. 41-3401, with the commission of the offense of rape. Prior to 1915 conviction for this offense carried a mandatory death penalty. By Act No. 187 of 1915 (Ark.Stat.Ann.1947, Sec. 43-2153) the mandatory death penalty was removed as to all capital offenses and the jury trying the accused was authorized to bring in a verdict of guilty and life imprisonment in the State penitentiary in lieu of the death penalty, if it so desired.

2. At the conclusion of this trial the court provided the jury with three forms of verdicts, as follows: (1) Not guilty; (2) Guilty with life imprisonment; (3) Guilty as charged. After several hours of deliberation the jury returned verdict No. 3, making the death sentence mandatory. Such a sentence was pronounced upon the appellant

on April 5, 1962. Execution of appellant has been stayed pending review of the case here on appeal.

[1] 3. We have painstakingly examined the entire record. We have considered on its merits every motion made on behalf of appellant and denied by the trial court and we have considered on its merits every objection interposed by counsel for appellant to which adverse rulings were made by the court. In capital cases the formal saving of exceptions to adverse rulings is unnecessary. Ark.Stat. Ann.1947, Sec. 43-2723.

I. Sufficiency of the Evidence

[2] The offense involved was committed on November 3, 1961. Within a matter of hours appellant was taken into custody. State and Federal authorities collaborated in a thorough investigation of the crime and on November 7, 1961, appellant was formally charged by the filing of a criminal information. Appellant makes no complaint as to the circumstances of his arrest or as to the promptness of the State's attorney in filing the information against him.

Miss Stella Spoon, age 35, lived with her aged and helpless father at 108 Nichols Street in the city of Hot Springs, in Garland County. Near 3:00 a. m. on November 3, 1961, she was aroused by an unusual noise. Clad only in her pajamas, she went into the living room. She saw the form of a man at the window engaged in cutting or breaking the screen. She warned the intruder to leave or she would call the police. The man kept trying to force the screen and she ran to her telephone in the same room to call the police. Almost in the same instant the man burst through the window. Miss Spoon had dialed the operator before she was violently seized and the receiver

knocked from her hand. The telephone operator, hearing the screams, connected the line to police headquarters, where an officer heard the screams and the struggle, traced the call, and dispatched officers to the scene.

Once inside the home, the intruder subjected Miss Spoon to a literal nighmare of brutality and abuse. She fought and struggled, but to no avail. She struck the intruder with a purse. When he forced his hand over her mouth to silence her screams she bit his finger, causing it to bleed. Her helpless father tried to aid her, but was struck and left bleeding. She tried to escape through the front door, but was caught. Her attacker kept threatening to kill her and her father as well. She was dragged and forced outside the house without shoes, and while clad only in her pajamas was forced to a remote spot some two blocks from her home, where battered, bruised, bleeding and exhausted she was overpowered and compelled against her will to suffer a deliberate and calculated rape of her person. After the ravage of her person had been accomplished, and before fleeing, her attacker threatened to kill her and her father if she told.

Testimony establishing the identity of appellant as the attacker is clear and emphatic. At the window he had a part of a nylon stocking on his head, with a knot in it. When he appeared to try to quickly jerk it down over his face it came off. A piece of nylon hose was found near the home of the victim and the FBI Laboratory at Washington, D. C., found in said nylon hose specimens of hair similar in every detail to that of appellant. A thread of nylon combed from appellant's head was found to be exact in all details with the threads of the hose found near victim's house. Negroid hair found in the home of the victim corresponded exactly with hair of appellant.

Officers working on the case were quick to note the fresh injury to appellant's finger and the condition of the clothes he was then wearing. Officers were dispatched to his mother's home, where appellant resided, and she was advised that her son was in trouble. They asked permission to examine his clothes and his mother consented thereto, taking the officers to the clothes closet and permitting them to take a change of clothes and also a blue coat and a trench coat belonging to appellant. The officers forwarded to the FBI Lab in Washington, D. C., the clothing removed from the person of the appellant, his blue suit coat, his trench coat; the victim's pajamas and the strands of hair, nylon thread and hose previously mentioned. The repeated and violent contact between the pajamas worn by the victim and the clothing of appellant left their telltale marks on both garments.

Robert Duckett, Special Agent, FBI Laboratory, whose qualifications were admitted as an expert on hairs, fibers, textiles and related materials, testified: "It has been my experience that when clothing comes in contact with other clothing or objects fibers will be interchanged or deposited. Now working on this assumption, I removed the foreign debris adhering to the T shirt that was submitted to me, the suit that was submitted to me, and the trench coat that was submitted to me * * * I mounted the foreign fibers and I compared those foreign fibers that I had recovered from the debris from the garments with the fibers composing the red pajamas. In the debris of the T shirt, in the debris of the suit coat and in the debris of the trench coat, I found red cotton fibers that matched the fibers composing the pajamas. * * *" He also testified in detail as to the matching hair and nylon thread and hose specimens examined as set out above.

Allison Simms, Special Agent, FBI Laboratory, whose qualifications as an expert in analysis of blood stains and body fluids were admitted, testified: "I was examining these articles for the purpose of blood stains and seminal stains. Seminal stains are stains which consist of semen and semen is the male reproductive fluid which contains the male reproductive cell. I examined the pajama bottoms and tested these stains chemically and determined that these reddish brown stains consisted of blood—human blood. In the crotch of the pajamas I identified seminal stains—also on the front portion of both legs of the trousers I identified seminal stains which contained spermatozoa. On the shirt I did not find any semen but there were blood stains present which were human blood. • • •"

Miss Spoon struggled with her unmasked attacker in the light of her living room and having never seen him before made a special effort to remember his face. She testified:

> "Q. Is that the man? (indicating appellant, then standing to be observed by the witness)
> "A. Yes, sir, it is.
> "Q. Is there any possible doubt in your mind?
> "A. No, sir."

Dr. James H. French (professional qualifications admitted by appellant) examined the victim shortly after the crime in the emergency room of a Hot Springs hospital. He testified: "The patient had numerous bruises, cuts about her person. She had the undersurface of her left toe torn, the greater part of the skin was torn. She had a bruise on her right hip, both wrists had abrasions circling the wrist, she had bruises of both forearms, she had a

bruise and swelling of the lower lip, she appeared emotionally upset. I did an internal examination and obtained a smear from the mouth of the womb and found living spermatozoa of the male germ cells in the secretion."

The evidence in this case met in overwhelming fashion all of the requirements for conviction for the offense of rape (Ark.Stat.Ann.1947, Sec. 41-3402). McDonald v. State, 225 Ark. 38, 279 S.W.2d 44.

II. Motion to Quash Information

[3] This criminal information was filed under authority of Amendment No. 21 to the Constitution of Arkansas. Appellant requested and was granted additional time by the court in which to enter his plea to the charge. A bill of particulars was provided appellant and his counsel, no objection being interposed thereto. After arraignment and plea of not guilty appellant requested and was given additional time in which to prepare his defense. When appellant was finally placed upon trial he and his counsel knew with particularity the exact nature of the charge. Counsel for appellant and appellant were present in open court on February 5, 1962, when the motion for continuance was granted and an agreed trial date of the case, beginning on March 19, 1962 was set. No additional time was requested for preparation for trial. Hearings on preliminary motions were ended on March 16, 1962, and the court at that time asked counsel for appellant if there was any reason why the trial could not commence on March 19, 1962, as set, and was advised "The defense will be ready." The rights of the accused were fully protected. This Court and the Supreme Court of the United States have many times held such prosecutions by information valid. Wash-

ington v. State, 213 Ark. 218, 210 S.W.2d 307; Moore v. State, 229 Ark. 335, 315 S.W.2d 907, cert. denied, 358 U.S. 946, 79 S.Ct. 356, 3 L.Ed.2d 353; Hurtado v. Cal., 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232; Gaines v. Washington, 277 U.S. 81, 48 S.Ct. 468, 72 L.Ed. 793; Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 27. Denial of the motion of appellant to quash was proper.

III. Motion to Declare Statute Unconstitutional in Application

[4] In this motion appellant concedes that our penalty statute for rape (Ark.Stat.Ann.1947, Sec. 41-3403) is not unconstitutional on its face, but contends that in its application to appellant and all other members of the Negro race it is unconstitutional for the reason that in Arkansas it is the practice and custom of juries to impose the death penalty upon Negro men who rape white women, without inflicting the same punishment upon other offenders. The court heard evidence on the motion. Lee Henslee, Superintendent, Arkansas State Penitentiary, testified, on call by appellant, that between the dates of September 5, 1913, and October 28, 1960, the records of the penitentiary reflected that there had been 168 executions, broken down by charge and race as follows:

Negro for rape	19	Negro for murder	108
White for rape	1	White for murder	38
		Indian for murder	2

This bare listing of the number of executions does not pretend to cover the total number of such offenses by race or otherwise, nor does it cover trials resulting in acquittals, imposition of life sentences, or cover the intervention of

executive clemency.[1] Certainly there was no evidence offered even remotely suggesting that the ratio of violent crimes by Negroes and Whites was different from the ratio of the executions. There was no testimony suggesting that the State's attorneys in the various judicial districts had not been asking for the death penalty in their prosecutions for rape, whether the accused be black or white. In any event, the jury alone could determine the death penalty. The attack therefore appears to be directed against trial by jury.

We have carefully reviewed the decisions of the Supreme Court of the United States cited by appellant in support of his position. We comment briefly as to same. Pace v. Alabama, 106 U.S. 583, 1 S.Ct. 637, 27 L.Ed. 207. Here an Alabama statute was upheld as not in conflict with the Constitution of the United States, although it prescribed penalties more severe for adultery between persons of different races than for members of the same race. And in Friedman v. People, 341 U.S. 907, 71 S.Ct. 623, 95 L.Ed. 1345, the case was dismissed upon motion for want of a substantial Federal question. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. In this case it was admitted that discrimination was being practiced against certain persons (Chinese) in denying them permits to operate laundries, although possessed of all qualifications set forth in the city ordinance under review. Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84, is one of

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[1] Most of the opinions of this Court do not identify the race of the defendant, and it is impossible to obtain accurate information without reviewing the transcripts, which may or may not reflect the race of the accused. Appellant has listed only one execution of a white man for rape (which happened a few years ago), and this Court, only a few months ago, affirmed the conviction of another white man, with death penalty, on this charge. See Fields v. State, 235 Ark. 986, 363 S.W.2d 905.

several cases involving discrimination as to race in jury service. Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281, involved abuses in voter registration. Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, is a criminal case where the conviction was reversed because of long days of confinement and mistreatment before the filing of charges and where confessions were obtained by coercion.

We fail to find any support in the above cases for appellant's position. Striking down our criminal statutes as to a large segment of the population upon the tenuous grounds urged by appellant is illogical. It could only result in chaos in the difficult job of law enforcement for the protection of the people. This Court concurs emphatically with other appellant courts of the United States in holding that justice should be administered equally and fairly as to all citizens regardless of race or color. Our penal statute for rape applies equally to all citizens of all races. On the record before us we find no basis whatever to declare our penal statute for rape unconstitutional in any respect of verbage or application. Appellant's motion was properly overruled.

IV. Motion for Change of Venue

[5, 6] The burden was on appellant (Ark.Stat.Ann.1947, Sec. 43-1502) to make credible proof to support his motion. A hearing was had. All of the witnesses called by counsel for appellant testified squarely against his position. Incidentally, we note here that in appellant's listing of executions for rape that not a single such case appears to have originated from Garland County, where this case was tried. There was no abuse of discretion by the trial court in overruling the motion for change of venue. Speer v. State, 130

Ark. 457, 198 S.W. 113; Adams v. State, 179 Ark. 1047, 20 S.W.2d 130.

V. Motion to Remove to Federal Court

[7] Ordinarily such motions are filed directly in Federal Court. No cause was shown justifying such removal, and the trial court properly refused to surrender its jurisdiction. Rand v. State, 191 F.Supp. 20 (D.C., Ark., 1961).

VI. Objections Relating to Voir Dire

[8] The trial court had the advantage of observing and appraising the demeanor and answers of all prospective jurors. He allowed appellant's counsel the greatest latitude in examining the jurors before they were approved by the court for duty in the case. Indeed, we think the court proceeded in an exemplary manner in securing a jury free from actual or implied bias or prejudice. The objections of appellant concerning the selection of the jury were properly overruled. Polk v. State, 45 Ark. 165; Maroney v. State, 177 Ark. 355, 6 S.W.2d 299; 50 C.J.S. Juries § 275 a(1).

VII. Objections as to Limitations of Examination of Witnesses

[9] We find from the record that the court conducted the trial of this case in such a manner as to provide counsel for appellant every reasonable and legitimate latitude in cross-examination of witnesses—no witnesses having been put on by appellant. All objections of this character are found to be without merit and properly overruled.

VIII. APPELLANT'S VARIOUS MOTIONS TO EXCLUDE ALL EVIDENCE ADDUCED BY PROSECUTION CONCERNING ITEMS OF CLOTHING AND OTHER MATERIALS EXAMINED AT FBI LABORATORY, WASHINGTON, D. C.

[10] When the police authorities sent in for examination the clothing of appellant, the pajamas of the victim, and the other items, as previously mentioned, such action could have helped to exonerate appellant rather than help to convict him, depending upon the findings at the laboratory. In this case the findings pinpointed the guilt of appellant.

The clothing removed from the person of appellant as an incident of his arrest for the crime under investigation was properly obtained. Jones v. U. S., 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed.2d 1514; Drayton v. U. S., 5 Cir., 205 F.2d 35.

[11] As to items taken from the home of appellant's mother, with whom appellant resided, the evidence clearly shows that the mother not only consented to the search, but assisted the officers in same. She was present at the trial but did not testify. Neither was a motion filed to quash the evidence obtained at the home. The proof by the State met the burden upon the State in proceeding as it did without a search warrant. Rigby v. U. S., 101 U.S. App.D.C. 178, 247 F.2d 584; Cantrell v. U. S., 5 Cir., 15 F.2d 953, cert. denied, 273 U.S. 768, 47 S.Ct. 572, 71 L.Ed. 882.

"The consent of a householder to the search of the house dispenses with the necessity for a search warrant, * * * where his mother, with whom defendant was living, consented to the search, though defendant objected to the

search of his room." Gray v. Commonwealth, 198 Ky. 610, 249 S.W. 769.

[12] The right to object to evidence on ground of illegal seizure is waived unless there is a timely motion to suppress the evidence. Morton v. U. S., 79 U.S.App.D.C. 329, 147 F.2d 28, cert. denied, 324 U.S. 875, 65 S.Ct. 1015, 89 L.Ed. 1428; Butler v. U. S., 10 Cir., 153 F.2d 993. No motion to suppress was filed as to any item sent to the FBI Laboratory

[13] Lieutenant Crain was examined and cross-examined concerning a blue coat obtained at the home, without any objection being made as to the admissibility of such evidence. The admissibility of said evidence was waived. Sandusky v. Warren, 177 Ark. 271, 6 S.W.2d 15.

[14] The objections stated by counsel for appellant to the items sent to the FBI Lab were always made in blanket or in all inclusive form, with no breakdown as to any given item. Such objections are of no avail where any one of several items covered in the blanket objection was lawfully and properly obtained. Eureka Oil Co. v. Mooney, 173 Ark. 335, 292 S.W. 681; Haney v. Caldwell, 35 Ark. 156; Martin v. Monger, 112 Ark. 394, 166 S.W. 566.

Appellant, in his various motions to strike all evidence introduced concerning the articles sent to the FBI Laboratory, has relied almost exclusively upon Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, a leading case in which judicial developments as to search and seizure were reviewed comprehensively. In the Mapp case, Dollree Mapp was within her own home. Officers appeared and demanded admittance. She refused because they did not produce a search warrant. After some three hours, and without a search warrant, the officers forcibly entered the home,

searching for and obtaining evidence in the form of lewd photographs, subsequently used in evidence. There is no similarity of facts in the instant case with the Mapp case, supra, and the action of the Supreme Court of the United States in reversing Mapp v. Ohio, supra, is inapplicable here.

[15] The items in question, examined by the FBI Lab, were in court during trial, in their original containers from the FBI. They were described in detail in oral testimony of witnesses who had been in custody of or had examined same at the laboratory. The items were not passed to the jury for personal inspection nor were they listed as formal exhibits to the oral testimony adduced concerning same. The direct examination of FBI Special Agent Duckett; his cross-examination and the direct examination of FBI Special Agent Simms had been completed before any objection was made seeking to strike all of their testimony. Counsel for appellant in making an objection told the court that the articles themselves had been introduced in evidence, although improperly. The crux of the evidence as to the items given laboratory examination was the findings as to the stains, body fluids, similarity of hairs, nylon thread, etc. This evidence was susceptible, absent a stipulation of counsel, to introduction solely in oral form. Even if it had been possible to conduct the laboratory tests in the presence of the jury, such testing would have been worthless as evidence without oral testimony explaining the results and findings.

[16] Physical objects explained to the jury may be used in presenting evidence without formal introduction. Meyer v. State, 218 Ark. 440, 236 S.W.2d 996; Gordy v. State, 159

Tex.Cr.R. 390, 264 S.W.2d 103; Underhill Criminal Evidence, 5th Ed., Sec. 110.

In Featherston v. Jackson, 183 Ark. 373, 36 S.W.2d 405, this Court said: "On the trial a rough sketch, or map, showing tracks or ruts in highway was used by appellee in examining his witnesses. Appellant objected to use of said map. It was not introduced in evidence, but the day after the trial was over, he filed a motion to require appellee to file the map. This came too late and the court correctly denied the motion."

At no time in this case did appellant ask for the formal introduction into evidence of the items examined by the FBI Laboratory.

We therefore conclude that the trial court did not commit error in refusing to strike the testimony of the special agents of the FBI. All other motions of appellant to strike testimony were likewise properly denied.

IX. Instructions

[17] Appellant complains that certain instructions requested by him were not given. An examination of the record discloses that the subject matter of such requested instructions was fully covered in other instructions given by the court. We have consistently held that it is not error to refuse an instruction where the matters are fully covered by instructions already given. Griffin v. State, 210 Ark. 388, 196 S.W.2d 484.

X. Argument of Counsel

[18] Appellant objected to the following remarks of the prosecuting attorney during argument:

"* * * He could have choked her to death as easily as not.

> * * * He could have had a knife in his pocket and pulled it out and she did tell you, I believe, that he had some instrument when he was breaking in the screen. He could have pulled a knife out of his pocket and cut her throat from ear to ear.
>
> "The Court: He is referring to why she was in fear of her life. Your motion is overruled."

Once inside the home of the victim appellant had access to all the kitchen knives and other possible weapons therein. He repeatedly threatened to kill both the victim and her father. Under the proof in the case we see no impropriety in the ruling of the court.

In his opening statement counsel for appellant stated:

> "It is the position of the Defense, and the Defense will prove, both by cross-examination of the witnesses that the State will call and by evidence that it will produce itself that this alleged crime as described by Mr. Whittington could not, and in fact did not take place as he stated. * * * That if in fact an assault did take place that certainly it was not rape, that if any assault did take place it was free and voluntary on her part. I think you will find that the evidence as adduced here in the Court, both the evidence produced by the prosecution and by the evidence adduced by the defendant that if in fact an assault did take place it was a free and voluntary act. * * * "

An objection was made during closing argument of prosecution and is set out as follows:

> "Mr. Whittington: May it please the Court, ladies and gentlemen, when the counsel for the defense made

his opening statement he told you that he would prove to you that this matter did not take place as I had told you in my opening statement, that it was a free and voluntary act, and he would prove that it was a free and voluntary act on the part of Stella Spoon. Now, ladies and gentlemen—

"The Court: One moment, Mr. Whittington, Mr. Mercer wants to interpose an objection.

"(Out of hearing of the Jury)

"Mr. Mercer: Court please, I object to the prosecuting attorney in his argument to the Jury talking about anything the defendant has to prove because the defendant doesn't have to prove anything.

"The Court: Well, he is repeating what you said in your opening statement. I think he has a right to refer to it and comment on it.

"Mr. Mercer: Court please, it is not incumbent upon the defendant to prove anything.

"The Court: I understand.

"(Mr. Whittington continues argument:)

"Now, ladies and gentlemen, while it is not incumbent upon the defendant to prove anything, the defendant's attorney got up here and he told you they were going to prove some things. They don't have to prove anything, I am the one that has to prove the case, let's get that clear. The Court so instructed you. But he told you what all he was going to prove and I am still waiting to hear any of that proof. I haven't heard a word of it. We have people who must have known where the defendant was that night, if he wasn't where he was supposed to be, I haven't heard any of them say he wasn't there. * * *"

Remarks of the prosecuting attorney were well within proper limits, and we find no error in same. Ark. Power & L. Co. v. Hoover, 182 Ark. 1065, 34 S.W.2d 464; Culbreath v. State, 96 Ark. 177, 131 S.W. 676.

XI. SUMMARY

The verdict reached and the sentence imposed do not appear to offend the Constitutions of the State of Arkansas or of the United States; the statutes of Arkansas and decisions heretofore rendered by this Court. Appellant received a fair and impartial trial in every respect.

Judgment is affirmed.

HOLT, *J.*, disqualified and not participating.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 429

WILLIAM L. MAXWELL ..... *Petitioner*

v.

DAN D. STEPHENS, Superintendent of the Arkansas State Penitentiary ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1965

No. 429

WILLIAM L. MAXWELL ..... *Petitioner*

v.

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Arkansas State Penitentiary ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

Both the majority and dissenting opinions of the United States Court of Appeals for the Eight Circuit, the Memorandum rendered by the United States District Court for the Eastern District of Arkansas, and the unanimous opinion of the Supreme Court of Arkansas have all been properly noted in the petition for writ of certiorari and have been set forth verbatim in the appendix which accompanies the petition.

JURISDICTION

The authority of which petitioner relies to invoke the jurisdiction of this Court is also contained in the petition.

STATEMENT

The petitioner, William L. Maxwell, is a condemned prisoner in the Arkansas State Penitentiary who was charged by felony information for the crime of rape of Stella Spoon during the early morning of November 3, 1961, in Hot Springs, Arkansas. Although the guilt of the petitioner is not in controversy here, a brief review of that tragic event is pertinent to the consideration of other issues in the petition.

The trial record sustains the perpetration of a most vicious and heinous crime. The victim, a rather frail woman, lived with her aged and crippled father in a sparsely populated area of Hot Springs. After she had retired for the evening, she was aroused by a noise from the front of the house. As she entered the living room a small night lamp in her father's adjoining bedroom alerted her to the presence of a person outside of the window. She immediately turned on a ceiling light revealing the petitioner cutting the window screen. The petitioner attempted to conceal his identity by pulling a stocking over his face, but this effort was unsuccessful and the stocking fell from his head. Miss Spoon immediately ordered the intruder to leave and dialed "operator" on her telephone to summons the police. By this time petitioner had entered the room through the window and knocked the young woman to the floor. Miss Spoon

did not have the opportunity to give any information, but the operator heard her screams for help and immediately made telephonic connection with the police. The address was subsequently determined and assistence was dispatched.

When the victim's father attempted to intervene to protect his daughter, petitioner threatened his life and brutally struck the elderly man rendering him totally helpless. When the police arrived, Mr. Spoon was found bleeding, incoherent, and afraid to open the house to the officers.

Before the officers had reached the house, petitioner had forcibly taken the young woman to a vacant lot where he overcame her stubborn resistance and savagely consummated sexual intercourse. Terrorized and shocked, the prosecutrix found her way to a street where searching police discovered her wet, barefooted and almost nude. The officers took her directly to a hospital and she was immediately examined by a physician. She was required to remain in the hospital for three days to recover from the injuries petitioner had inflicted upon her.

During the ordeal, the assailant had stated that his name was Willie Washington. Miss Spoon reported this information to the police and two persons, Willie Washington, Senior and Junior were brought to the hospital and were released when she declined to identify either. A Negro policeman, Officer Pettis, was brought to assist the investigation. After further description and failure to identify other suspects, Officer Pettis recalled seeing the petitioner earlier that evening with young Willie Washington. On the basis of what had become a rather detailed description of the assailant together with confirming the presence of petitioner near the area where the

crimes were committed earlier in the night, it was ordered that petitioner be brought to the hospital.

On these instructions, a policeman in a patrol car went to the Maxwell home where petitioner was then residing with his parents. Mrs. Maxwell, petitioner's mother, answered the officer's knock and, upon inquiry, went to determine if her son was in the house. She returned to tell the officer that he was in bed and invited the officer into the house and directed him to the room where Maxwell was staying with his two younger brothers, aged fourteen and nineteen. When the officer came into the bedroom with his flashlight he cast the light on Maxwell who was feigning sleep. Maxwell was aroused and advised that he was wanted downtown or at the hospital. Without asking why and not indicating any desire not to accompany the officer, Maxwell approached the closet as if to secure some clothing. At this time the policeman told Maxwell to dress in the clothes that were still wet and on a chair next to the bed. The petitioner complied without any protest. After Maxwell was taken to the hospital and identified by Miss Spoon, he was then confined in the city jail. Later in the day he was transferred to the Hot Springs County Jail in an adjoining county where he stayed over the weekend. The following Monday petitioner was brought back to Hot Springs, arraigned and placed in the county jail to await trial.

The trial judge appointed two local lawyers for the defense of petitioner, but these attorneys were discharged when petitioner employed private counsel. A continuance of the trial was granted and several motions were presented to the trial court. The trial was scheduled by agreement. Numerous witnesses testified including two experts from the Federal Bureau of Investigation and, although petitioner had confessed to the crime on two sep-

arate occasions, neither statement was used in the prosecution of the case.

The crime was proved by overwhelming evidence. The jury returned a verdict of guilty without a recommendation of leniency and petitioner was sentenced to death. The conviction was affirmed by the Supreme Court of Arkansas and rehearing denied. No application was made for certiorari to this Court. A petition for habeas corpus was filed in the United States District Court four days before the scheduled execution. The execution was stayed and a full hearing was conducted on all issues raised by petitioner.

The basis of the petition before the district court remains much the same as those presented in this petition for certiorari. In essence, petitioner challenges the circumstances incident to the procurement of his blue coat; the application of the death penalty for the crime of rape in Arkansas; the prerogative of a trial jury to not recommend leniency upon the rendition of a verdict of guilty of rape; and, the selection and composition of the petit jury panel in Garland County.

The statement contained in petitioner's brief is, for the most part, a fair resume of the circumstances surrounding the issues involved in this litigation. There are, however, several gross misrepresentations of testimony and facts which are consistent with petitioner's theory of the case. Rather than dwell upon those matters, in interest of brevity, appropriate remarks are noted at the applicable points of discussion in this brief. To foster continuity and the consideration of the issues presented by petitioner, the organization of the petition and the manner of reference is utilized to the several volumes of records now compiled in this prolonged and frequently considered case.

ARGUMENT

It is submitted that the petition for writ of certiorari does not disclose any substantial issue of law which warrants review by this Court. The several records in this case fail to support the conclusion that petitioner was deprived of any right made available by the Constitution of the United States. The respondent is benefited by the lengthy opinion of the Arkansas Supreme Court affirming the petitioner's conviction and the studious decision of the district court denying the writ of habeas corpus. That ruling was affirmed on appeal by the United States Court of Appeals for the Eighth Circuit. All of those decisions are eminently correct and are in concert, as applied to the facts disclosed in this case, with the several pronouncements of this Court.

I

The Validity of Procuring Petitioner's Coat in Absence of a Search Warrant.

It is asserted initially by petitioner that certiorari should be granted to determine the legality of search of petitioner's home in his absence, without a warrant, under a purported consent of his mother (p.18 of Petition). This argument is based upon a false premise. Both the district court and the court of appeals concluded that petitioner was living with his mother and father completely gratus and possessed no proprietorship in the room. These circumstances were carefully developed during the hearing in the district court.

It is against this background that petitioner seeks to invoke the provisions of the Fourth Amendment. Although the language has been often repeated and is

familiar, in view of petitioner's attack, it is well to note the specific terms of protection before proceeding further. It is provided:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

In support of his position, petitioner relies on certain alleged uncontroverted facts in connection with his apprehension and the subsequent procurement of the blue coat. As mentioned previously, either petitioner has been somewhat careless summarizing these events, or perhaps was overzealous in seeking support of his theory of the case. Even though respondent prefers the latter explanation, some clarification still must be offered to insure proper perspective and consideration of the issue.

The crime occurred near 3:00 a.m. on November 3, 1961. This was the approximate time recorded on the police radio log when Miss Spoon's screams were heard over the telephone (Ark. 250-251).

Since petitioner has abandoned his challenge of his arrest, it will suffice to say that pursuant to information and instruction, Officer Childress proceeded to the Maxwell home and learned that the petitioner was there. The officer was directed to the bedroom where the petitioner was found in bed. Upon advising petitioner that he was to be taken downtown, petitioner was directed to put on some wet clothes hanging near the bed. (D.C. 267) At this time Maxwell attempted to go to the closet to secure other clothes when the officer repeated the request. Without objection, Maxwell put on the damp clothes, but either purposely or inadvertently failed to get the blue coat that he had been wearing that night.

After petitioner had been identified at the hospital, it was discovered that the blue coat was missing. Although there is some deviation in the estimates of time, the coat was secured by the police officers near 5:00 a.m. (D.C. 243).

The circumstances of the second visit to the Maxwell house were touched briefly in the state court trial, but were described in detail at the hearing before the district court. One officer, Lt. Crane, testified before the trial jury as to the manner in which petitioner's coat was secured and that Mrs. Maxwell had consented to the search without objection (Ark. 333-334). His explanation that the entry was invited was uncontradicted, not withstanding the fact that Mrs. Maxwell attended the trial and was present when this testimony was related (Ark. 334). It is also imperative to remember that petitioner was sleeping in a room with two brothers, ages 14 and 19 (D.C. 143). If the actions of the investigating officers were contrary, petitioner was well fortified with several witnesses to contradict this testimony.

It should be obvious that no magistrate was available at the time the coat was obtained from petitioner's mother. Moreover, a judge or justice would not be available for perhaps four more hours. This would conservatively delay the time of recovery of the coat after issuance of a search warrant to 9:30 or 10:00 that morning. During this interim, there was a continuing danger that petitioner's family may have realized the importance of the article of clothing and would have either hidden or destroyed it. It will be recalled that petitioner had run afoul of the law numerous times. Although his family, was originally cooperative with the law enforcement officials, it appeared clear to the police, as it should to this Court, that there would be an inclination of the family to aid the petitioner

in his time of need even to the extend of destroying valuable evidence. This prospect cannot be ignored.

It is contended by appellant that his mother did not voluntarily consent to the officers entering the house and obtaining the coat. This assertion rests upon her comment that she was "afraid" not to let the officers in the house (D.C. 138). The facts of this case are, as observed by the district judge, that the officers knocked on the door, identified themselves, made a request for the specific article of clothing and were shown to the closet by appellant's mother (D.C. 143, 138, 242, Ark. 333-334). The record is replete that the officers were courteous and requested but one article. Mrs. Maxwell cooperated with the officers in every way (D.C. 138). She had no reason to refuse their entrance into the home. Although her husband was at work, Mrs. Maxwell was a mature woman of 38 years who had lived in the community for a long period of time. It cannot be presumed that she did not know a search warrant was necessary to enter the house if she demanded it. Her testimony before the district court indicates that she permitted the entry in respect for, rather than fear of, the police officers.

It is insisted by petitioner that the peculiar facts presented in this case present an important question of federal law which remains unsettled (p.22 of Petition). It is in this respect, the petitioner states that there is probably no issue more frequently litigated than the validity of a consent to a warrantless search.

In all deference, if consent is frequently controversial, it is a result of unique circumstances or a matter requiring resolution of conflicting testimony. In any event, it is submitted that neither the law nor the facts in the case before the Court contain any new or perplexing problems.

Each of the three decisions supporting the conviction relied upon well established rules within the guidelines as provided by this and many other courts while exhaustively reviewing the contentions of error. It was unnecessary for any of the courts below to tread upon an unmarked avenue of law. When bared of the phrases laboriously repeated by petitioner, the facts in this case are remarkably clear and uncontradicted. The officers visited the house on three occasions. The purpose of the first was to take petitioner to the hospital for identification. As related previously, the second presence of police officers was to secure a blue coat. The third was to obtain a convenient change of clothes for petitioner's use.

The incident of securing the blue coat can hardly be termed a "search" within the general connotation of the term. As observed by the district court petitioner's mother, Mrs. Maxwell, in all candor refused to deny that she gave the officers permission to enter the house and go to her son's room. Under these circumstances, the majority of the court of appeals remarked that it might be viewed as if the officers never entered the house, but that petitioner's mother brought the coat to them.

It is conceded that the rules of the federal courts implementing the Fourth Amendment of the United States Constitution have been made applicable to the states under the due process clause of the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643. It is also agreed that illegally obtained evidence cannot be used to aid criminal prosecution. *Boyd* v. *United States*, 116 U.S. 627. But a valid search may be made of the accused and the premises in conjunction with a lawful arrest.

A permitted search is proper and valid. *United States* v. *Roberts*, 223 F. Supp. 49 (E.D. Ark. 1963), 332 F. 2d

892 (8th Cir. 1964); *Commonwealth* v. *Tucker,* 76 N.E. 127, 189 Mass. 457, 7 LRA (N.S.) 1056.

A valiant effort is made by petitioner to the end that his mother needed his permission to give the police officers the coat. The basis of this argument is that the Fourth Amendment should be extended to offer protection in these circumstances. Again, the authority is contradictory to this theory. *Irvin* v. *State,* 66 So. 2d 288, cert. den. 346 U.S. 927.

It is undisputed that, although appellant had reached his majority, he still resided with his parents as their son, sharing a room with two brothers (U.S. 141, 147). Cf. *Gray* v. *Commonwealth,* 249 S.W. 769, 198 Ky. 610 (1923).

The circuit court of appeals, on review, was cognizant that the district court had applied the proper standards to reach the decision. There was no real disparity of case authority used in the separate opinions of the circuit court of appeals, but only a reaching of adverse factual findings.

The only criticism voiced by the dissenting circuit judge was that, in his view, the facts had established implied coercion. In reaching a contrary conclusion, the majority did not rely on a conflicting concept of law.

Hence, in this context, the argument for or against implied coercion was totally and essentially a resolution of factual considerations. Appelate courts have traditionally been hesitant to substitute their conclusions from a printed record in place of the hearing judge who had the benefit of seeing, hearing and experiencing the atmosphere of the hearing.

Thus, this case does not present new, unusual or conflicting concepts of law. On certiorari, this Court would only be satisfied that there was substantial evidence to support the conclusions of fact announced by the district court. There is, of course, one alternative. This would be to ignore the prior holdings of this Court and rule that there can be no valid consent to a search as a matter of law no matter what the circumstances.

This may seem to be, at first blush, a rather strong appraisal of what must be accomplished by granting certiorari. This conclusion is, however, inescapable.

II

The Constitutionality and Application of the Death Penalty for the Crime of Rape.

A. *The Alternate Penalties for the Crime of Rape in Arkansas Are Constitutional and Have Been Properly Enforced.*

The second principal topic contained in the petition is devoted to a condemnation of the alternative penalties of either a death or life imprisonment for those found guilty of the crime of rape. It is stated by petitioner that there are perhaps seventeen states that still retain capital punishment for rape and with one exception, all of these juridictions may be properly described as southern or border states (p.33 of Petition). It might also be observed that those same states identified by petitioner comprise the so-called "Bible Belt". So much for irrelevant geography.

To be sure, a statute imposing a greater punishment on one race than another would not only contravene the

Fourteenth Amendment to the Constitution of the United States, but would also offend the Constitution of Arkansas as well. Ark. Const., Art II, § 3. Since 1842 this jurisdiction, as well as many other states, has provided that the death penalty may be imposed, as in common law, for those found guilty of the crime of rape. (Ark. Stat. Ann. § 41-3403 (1947). In 1915, the General Assembly gave the jury the prerogative to assess either a life or a death sentence. Ark. Stat. Ann. § 43-215 (1947). If the jury does not render a verdict of life imprisonment, the death penalty is mandatory. Ark. Stat. Ann. § 43-2153 (1947). *Kelley* v. *State,* 133 Ark. 261, 202 S.W. 49, 54 (1918). Cognizant that there is no statutory distinction of the race of the defendant, the petitioner apparently concedes that there is no deprivation of due process by law in Arkansas, but a statute may be improperly applied even though valid on its face. *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1885).

A substantial portion of petitioner's argument is devoted to a recitation of certain statistics of the number of persons executed for rape in the United States between 1930 and 1962. It is submitted by respondent that the compilations are not in the least persuasive and have no relation to this case. Parenthetically, it is noted that the percentage of Negroes executed for the crime of rape in Arkansas is proportionately smaller than the average of the other reported jurisdictions. It may be agreed that the states represented in Table 2 at page 35 of petitioner's brief have had substantially larger Negro populations than the balance of the other several states. Hence, no genuine comparison can be made with the entire United States.

Although respondent did not intend to assert that there is a higher crime rate among Negroes, the comments

of petitioner on the subject demand a response. The figures submitted by petitioner reflect that Negroes make up 89.5% of those persons executed for the crime of rape. The only conclusion which may be reached is that the incidence of rape by Negroes is substantially greater than that of whites. At the hearing on the petition for habeas corpus before the district court, petitioner was permitted to submit statistics from three counties in Arkansas. These figures were quite revealing, although no definite findings can be established. In Pulaski County, the charges of rape are almost balanced, eleven whites and ten Negroes, but non-whites make up less than 22% of the total population. Thus, the ratio of rape by Negroes is more than twice that by whites. In Jefferson County the crime by race is approximately proportionate. In Garland County, where the trial was conducted, there have been six white men and three Negroes accused of rape in the last ten years, but Negroes comprised less than 11% of the total population in Garland County (See 1960 Reports of the Bureau of Census). It is imperative to remember that in Garland County, there has never been a capital sentence for rape and only two men, one white and the other an Indian, have been sentenced to death for murder.

There is some criticism directed at the district judge by petitioner because the number of counties for inquiry was restricted, but no objection to this ruling was entered by petitioner (U.S. 313, 314).

The petitioner then quotes Senator Trumbull's remarks made during the consideration of the Civil Rights Act of 1866 (p. 38 of Petition). In all deference to the knowledge of the late Senator Trumbull there have been significant developments in the past one hundred years.

In the last fourteen years two white men and two Negroes have been executed for rape in Arkansas. This hardly smacks of disparity. Just how many Negroes have been found not guilty or guilty of lesser offenses that were not appealed cannot be determined. There is at least one reported case where a Negro found guilty of raping a white woman was given a life sentence. *Hamm* v. *State,* 214 Ark. 171, 214 S.W. 2d 917 (1948). In the words of the district judge, it is ironic that at the time petitioner was scheduled to die, a white man convicted of rape was executed. *Fields* v. *State,* 235 Ark. 986, 363 S.W. 2d 905 (1963).

Respondent agrees with petitioner that any conclusion of improper application of the death penalty must be gleaned from the facts evident in the case under consideration. In the final analysis, fair trials and justice are the concern of the courts, not statistics.

The statistical data completely ignores the evidence in each case which justified and compelled the highest penalty. It is remarkable that petitioner has not been so bold to say that the death penalty was not justified here.

Undisputedly, the petitioner has a burden of showing unconstitutional application of the death penalty. The jury discrimination cases are most analogous to the attack made here. Conceding *arguendo* that there may have been unconstitutional application of the death penalty and other crimes during the era of Senator Trumbull in 1866, this alone lends no discredit to future convictions. So, if it was proven that there had been jury discrimination in the past, but none shown in the panel under consideration, the contention would be summarily rejected.

It was aptly stated in *Brown* v. *Allen,* 344 U.S. 433 at 479 that: "Former errors cannot invalidate future trials."

The quantum proof required to demonstrate unlawful application must be " . . . shown by cogent evidence that the officers knowingly permitted others . . . " to receive the death penalty. To reiterate the records here are void of such a conclusion. *Hickinbotham* v. *State,* 227 Ark. 1032, 303 S.W. 2d 565.

Although the contention raised by petitioner is unique it is not without precedent. It should suffice to note that all authorities discovered by respondent is opposed to the proposition. *Maxwell* v. *Stephens,* 229 F. Supp. 205 (E.D. Ark. 1964); *Maxwell* v. *State,* 233 Ark. 700, 370 S.W. 2d 113 (1963); *Mitchell* v. *State,* 233 Ark. 578, 346 S.W. 2d 201; *Thomas* v. *Florida,* 92 So. 2d 621, cert. den. 354 U.S. 925; *Pace* v. *Alabama,* 106 U.S. 583.

The argument of petitioner, if accepted, would have ludicrous results. He would have this Court reverse convictions not on the basis of each case, but solely upon questionable history. The hazards are numerous. The question of a woman under a death sentence would demand reversal, according to petitioner, for the lack of statistics alone. A dual system of justice and punishment would be created: immunity for Negroes while Caucasians would be required to remain subject to the death penalty. Thus, petitioner would reverse the situation that he complains to be unconstitutional.

Petitioner asks that this Court grant *certiorari* to confirm petitioner's attempt to apply the "prima facie"

evidence principle (p. 38 of Petition). This seems hardly necessary since the records are totally void of any evidence that petitioner's trial jury improperly applied the death penalty.

Obviously doubtful of the firmness of his position, petitioner then recklessly accuses and ridicules the criminal administration of justice in Arkansas (p. 39 of Petition). In reference to the "continuing system of discriminatory administration of justice," respondent invites attention to *Walton* v. *State,* 232 Ark. 86, 334 S.W. 2d 657 (1960), where the Arkansas Supreme Court ignored the Negro attorney's nine-sentence brief, and found error on its own initiative, reversing the Negro defendant's murder conviction. Remarks are then directed by petitioner to Arkansas' long-time practice of systematic jury exclusion with citation to the only two cases in Arkansas where a federal court concluded racial discrimination, and surprisingly enough these two cases came from one county. There have been many affirmations by the federal judiciary of constitutional jury selection in Arkansas. *Dorsey* v. *State,* 219 Ark. 101, cert. den., 342 U.S. 851; *Haraway* v. *State,* 203 Ark. 912, cert. den., 317 U.S. 648; *Black* v. *State,* 215 Ark. 618, cert. den., 338 U.S. 956; *Moore* v. *Henslee,* 276 F. 2d 876 (8th Cir. 1960); *Moore* v. *State,* 229 Ark. 335, cert. den., 358 U.S. 946; *Payne* v. *State,* 226 Ark. 910 reversed on other grounds, 356 U.S. 560.

The lack of substance to the contentions of the petitioner have been revealed. In view of the law and the facts discerned in these records, there is no merit to the allegations of the petitioner.

B. *The Arkansas Statutory Penalties for the Crime of Rape Are Not Violative of the Eighth Amendment.*

At sub-topic II. B. of the petition it is asserted that the Courts of Appeals for both the Eighth and Fourth Circuits have invited the consideration of the United States Supreme Court to determine if the imposition of the death penalty for the crime of rape is violative of the Eighth Amendment to the Constitution of the United States. (p. 44 of Petition). Respondent disputes the correctness of this conclusion. It is offered rather, that ". . . whatever personal attitudes lower federal court judges as individuals might have toward capitol punishment for rape . . ." those personal convictions are restrained in favor of the long existent expressions of the legislatures of the several states.

In view of the precise separation of the branches of government provided by the United States Constitution and the authority vested in the states, federal and state judges have properly refrained from exercising their individual moral considerations. The courts refuse to question the expediency of an enactment under review for the responsibility rests on the wisdom and conscience of the legislative bodies. E.g. *Beauharnais* v. *Illinois,* 343 U.S. 250 (1951). This established rule of abstinence should be particularly applicable in an area so well fortified against invasion, judicial or otherwise, as the punishment of crimes. Never before has an argument been made that punishments for crimes must necessarily be consistent in every jurisdiction of this Nation.

It is apparently conceded by petitioner that the brutal circumstances found in this case would satisfy even the

criticism voiced by the dissenting justices in *Rudolph* v. *Alabama,* 375 U.S. 889 (1963). The challenge then does not rest on the basis that the sentence was not "consistent with civilized standards" but if the submission of punishment to the jury without directions or guides is *per se* unusual within the prohibition of the Eighth Amendment.

It is argued by petitioner that the trial jury was not invited to consider the extent of physical harm to his victim, the moral heinousness of the act, the prospect of reformation, or the deterrent effect of a death sentence. It is further stated by petitioner that the jury was permitted to choose between life and death for any reason or perhaps as a whim (pp. 44, 45 of Petition). A more critical indictment of the jury system cannot be imagined. The identical argument would be as persuasive in opposition to a punishment which offers a jury any latitude in severity. A trial judge is not required to give the reasons or matters considered in support of a minimum sentence as opposed to a greater sentence. The sanctity of jury deliberations has been recognized as a requisite in the American system of jurisprudence. See Ark. Stat. Ann. § 43-2204 (1947), *Wallace* v. *State,* 180 Ark. 627, 22 S.W. 2d 395 (1929). And the criticism voiced by petitioner does not reach a vital aspect of the decision as decided in *Jackson* v. *Denno,* 378 U.S. 368 (1964). Moreover, no request was made by petitioner that the jury was to make special findings or render a special verdict. The jury was only asked, with the permission of the petitioner, to determine his guilt and sentence.

It may be presumed with confidence that all of the subjects mentioned by petitioner, such as the extent of physical harm, mercy, the sufficiency of punishment, etc., were argued to the jury by the attorneys. The finding

of guilt cannot, in all candor, be suspected to have been without reason or as a whim. It is futile for petitioner to suggest that during the lengthy trial the jury had not been furnished substantial quantities of compelling evidence of the physical harm suffered by the prosecutrix and every detail of the crime. It is certainly doubtful that an instruction was required to enlighten the jury as to the "moral heinousness" of the crime when the very nature of rape is adverse to the most fundamental concept of civilization.

Lest it be forgot, the victim of petitioner's brutal and vicious assault was deprived of her constitutional and God given rights. Anything more precious to the aggrieved woman cannot be imagined. Most should agree that Miss Spoon should enjoy security in her home with her father, that her body should not be violated, her father mercilessly beaten, her life threatened, or terrorized. This case does not present the opposition of carefully balanced constitutional rights, but demands, for the sake of justice, that the death penalty be imposed.

It is too easy for petitioner to contend that his sentence is unusual, purposeless and wanton, as to be unbelieveable under the circumstances. A death sentence for rape can hardly be described as either unusual or wanton. To do so would ignore the history of perhaps the most villainous and highest of crimes. It is true that penologists and criminologists as well as law enforcement officers possess a divergence of views as to the benefits to be derived from the existence of a death penalty and the purposes that may be served.

If, however, it can be validly concluded that punishment by fine or imprisonment acts as a deterrent to the

commission of crimes, then most assuredly the existence of the death penalty also presents a substantial restraint.

Finally, even though the United States Department of Justice may desire the abolition of the death penalty, as indicated by footnote 41 on page 45 of the Petition, it is significant that the matter was properly addressed to the Congress.

III

The Selection and Composition of the Petit Jury Panel.

The final argument contained in the petition for writ of certiorari urges that the statutory procedure for the selection of petit juries in Arkansas together with the method that the jury commissioners employed to assimilate the jury panel, is violative to the Fourteenth Amendment to the Constitution of the United States. This contention was rejected by both the district court and the unanimous opinion of the Eighth Circuit Court of Appeals.

Initially, it is imperative to note that the question, as presented in the petition for certiorari, is not identifiable with the assertion originally phrased in the petition for habeas corpus. Specifically, the petition alleged:

> ". . . That the poll tax books used by the jury commissioners in selecting the persons to serve as jurors for the term in which petitioner was tried designate the color and race of persons eligible to be called for jury duty; . . . and it has been the practice over the years for the jury commissioners to use poll tax books of Garland County, Arkansas, which designate the race and color of eligible persons to serve as jurors in making the selection

> and designation of perspective jurors, all in violation of the Constitution and laws of the United States."

Thus, there was no direct challenge of the statutory requirements of Arkansas to designate the race of each elector, but only to the use of records which contained identification of race. Furthermore, no issue of invalidity was made in petitioner's argument to the district court and little mention was made on appeal before the Eighth Circuit Court. Be that as it may, neither of the courts below recognized petitioner's vague assertions as a direct attack on the constitutionality of the Arkansas statutes.

It seems all too clear that until the petition for certiorari, the criticism launched against racial identification on poll tax records was more in the traditional vein as but one of an aggragate of circumstances which might conclude consideration of race during the selection of the jury panel. E.g. *Bailey* v. *Henslee,* 287 F. 2d 936 (8 Cir. 1961), cert. den. 368 U.S. 877. What seems to have happened is that prompted by the comment of the court of appeals concerning the constitutionality of the race identification statute led petitioner to manufacture this as an issue for certiorari when in fact petitioner failed to follow proper procedure to initially assert and save the matter for review. Considering the status of these records, this Court should follow its long established rule and refuse to inquire into matters which were not properly submitted to the lower courts for adjudication. Cf. *Sutton* v. *Settle,* 302 F. 2d 286 (8 Cir. 1962), cert. den. 372 U.S. 930.

An attempt is made to show that the Arkansas statute requiring racial identification is unconstitutional on the basis of *Hamm* v. *Virginia State Board of Elections,*

230 F. Supp. 156 (E.D. Va. 1964) aff'd sub nom. *Tancil* v. *Woolls,* 379 U.S. 19. There, it was stated:

> "Of course, the designation of race, just like sex or religious denomination, may in certain records serve a useful purpose, and the procurement and compilation of such information by State authorities cannot be outlawed per se. For example, the securing and chronicling of racial data for identification or statistical use violates no constitutional privilege. If the purpose is legitimate, the reason justifiable, then no infringement results. The infirmity of the provisions just mentioned lies in their mandate of separation of names by race."

With this language foremost, the statutes in controversy must be reviewed.

The jury commissioners are required to select those individuals who meet the statutory qualifications. Ark. Stat. Ann. §§39-101, 39-206, and 39-208 (1947). In Arkansas, only qualified electors may serve as jurors. Ark. Stat. Ann. §3-104.2 (1947). An elector must possess a current poll tax. Amend. VIII, Ark. Const., Art. III, §1. Similar requirements have met approval. *Gibson* v. *Mississippi,* 162 U.S. 565 (1896); *Brown* v. *Allen, supra,* 344 U.S. at 474, and 472 footnote 22.

The poll tax books are required to note the designation of the elector's race. Ark. Stat. Ann. §3-227(b) (1947). The list of poll tax payers are compiled as a poll tax book, published and distributed to the election judges by the county board of election commissioners. Ark. Stat. Ann. §3-118 (1947). There is no separation of names by race or different colored papers as discovered in *Hamm.*

A perusal of the previously noted statutes makes it abundantly clear that, consistent with most requirements

of voter registration, a person must give information, among other things, of his color. The obvious purpose of requiring this and other data is to assure a conclusive means of identification of the particular person and his eligibility to vote. The interest of the State is legitimate and justifiable. The practice of identifying persons by color has won approval by usage in almost every conceivable means of compilation.

It might be noted, parenthetically, particularly in view of the disturbance expressed in the past, that the poll tax as a requisite for voting and jury service has been abolished in Arkansas. Ark. Const. Amend. 51, §17. Temporary remedial legislation was required to be adopted. Act 126, Acts of Arkansas 1965, approved March 1, 1965.

Conceding *arguendo* that a valid question exists as to the use of poll tax records which contain racial identification, the court of appeals properly applied and followed the many pronouncements of this Court in disposing of the subject. The conclusion was clearly measured by the applicable standards and is consistent with the spirit of constitutional jury selection.

Jury duty has been described by the Supreme Court of Arkansas as a right incident of citizenship, subject to statutory regulations. *Buchanan* v. *State,* 214 Ark. 835, 218 S.W. 2d 700 (1948). It is incumbent on every court to guard the constitutional guarantee of a fair trial by jury. *Anderson* v. *State,* 200 Ark. 516, 139 S.W. 2d 396 (1940). It is presumed that a jury meets all constitutional requirements and the burden of establishing the discrimination is upon the accused. *Tarrance* v. *Florida,* 188 U.S. 519 (1903). The mere allegation of discrimination without supporting evidence is insufficient. *Carter*

v. *Texas,* 177 U.S. 442 (1900). A jury is not required to have proportional representation of all groups of the community in order to assure equal protection of law. *Virginia* v. *Rives,* 100 U.S. 313 (1879). Inequality or disproportionment of the number of Negroes finally selected as veniremen does not in itself constitute discrimination. *Akins* v. *Texas,* 325 U.S. 398 (1945). While a defendant has no right, constitutional or otherwise, to even have his race represented on a particular panel proportional racial limitation as such is forbidden. *Cassell* v. *Texas,* 339 U.S. 282 (1950). Simply stated, the race of the veniremen has no bearing and should not be considered by the jury commissioners. *Martin* v. *Texas,* 200 U.S. 316 (1906).

Of the three jury commissioners, one was a Negro and the other two were white. Cf. *Moore* v. *Henslee,* 276 F. 2d 876 (8th Cir. 1960). The jury commission has been so composed in Garland County for many years (U.S. 47). The panel in question had been selected approximately two months before the crime was committed. Cf. *Collins* v. *Walker,* 329 F. 2d 100 (5 Cir. 1964), rehearing denied, 335 F. 2d 417. A delay in trial date of only two or three weeks would have placed the trial of the case in a new term of court with a new panel of jurors. See Ark. Stat. Ann. § 22-310 (1947) for term of Garland County Circuit Court.

Traditionally, the cases involving discrimination in jury selection have been illustrated most dramatically by resorting to a statistical analysis showing the proportion of Negroes serving on the juries as opposed to those eligible for jury service. This tactic possesses a valuable convincing quality. Here, petitioner did not choose to employ such an approach or appraisal for the record

discloses that there was a greater proportion of Negroes participation on the jury panel than the Negro population of Garland County. *Maxwell* v. *Stephens, supra,* 229 F. Supp. at 215.

The petitioner suggests that there is judicial authority that any racial identification would, in itself, condemn the jury list and relies extensively on the case of *Avery* v. *Georgia,* 234 U.S. 559. This is, at the very least, misleading. Even a cursory study of that decision reveals that discrimination was concluded only after a finding that there was both a device of racial designation and discriminatory results. On the other hand, in *Brown* v. *Allen,* 344 U.S. at 480, there was a device of racial identification, but in the absence of finding actual discrimination, the conviction was affirmed.

The efforts of the jury commission confirm their honest dedication to the selection of a proper and valid jury panel. The anemic efforts of petitioner to show otherwise is unavailing.

Considering the status of the record, at the very least a serious question of waiver is presented. The facts and the law would both dictate that waiver of the opportunity to challenge the petit jury had been established. Notwithstanding that the selection and composition of the petit jury panel was entirely valid, it is urged that waiver also deserves a place of prominence in the consideration of this issue.

As a pure legal concept, waiver by a criminal defendant is difficult to prove under the rule of *United States ex rel Goldsby* v. *Harpole,* 263 F. 2d 71 (5th Cir. 1959) cert. den. 361 U.S. 838, as enlarged by *Fay* v. *Noia,* 372 U.S. 391 (1963). In practice, proof of waiver is almost

beyond the realm of possibility. One significant impediment is the rule of privileged communication. Ark. Stat. Ann. § 28-601 (1947). Another obstacle peculiar to this case is the substitution and replacement of the trial attorney by the appellate attorneys.

Still, this record sustains an excellent example of waiver which meets and satisfies both the spirit and the letter of *Fay* v. *Noia*. It was shown that the trial attorney for petitioner was infinitely aware of the procedure and the traditional grounds for moving to quash a petit jury panel on account of racial discrimination (U.S. 274-278). The attorney made a dedicated effort to discover any substantial basis to challenge the panel (U.S. 278-281, 298-303). After his exhaustive investigation, petitioner's trial attorney discussed the composition of the petit jury panel with the petitioner's parents and discussed the entire preparation of the trial with the petitioner and his parents (U.S. 291-292). The trial attorney for petitioner stated on cross examination that he did discuss the jury with petitioner, but did not confer with him in regard to a motion to quash (U.S. 297-298). Of course, petitioner denied that his attorney ever mentioned the jury panel to him (U.S. 305). From the record, it can be fairly surmised that the jury panel was a prime subject of conversation not only with the parents, but with petitioner himself. The petitioner and his family were personally acquainted with a substantial number of the petit jurors (U.S. 293-294). The use of the panel was apparently one of the tactics that petitioner employed in the trial (U.S. 284).

There can be no contention in this case that there is a hesitancy to challenge juries in Arkansas. On the contrary, this tactic appears to be quite popular in this jurisdiction, and is employed frequently by both white

and Negro attorneys. Thus, this case is significantly different from *United States ex rel Goldsby* v. *Harpole, supra.*

It is sincerely urged, notwithstanding the abundance of evidence sustaining a valid and constitutional jury panel, that this Court confirm that appellant waived the right to object to his trial jury. The petition cannot be described as an uneducated or unsophisticated defendant. He made average grades (B's, C's and D's) to high school when he quit for some reason, but continued his education in the service (U.S. 160, 161, 166, 185). Moreover, he had been educated in criminal procedure by experience (U.S. 197, 198). It should be appropriate to paraphrase the often quoted language that testimony of nonwaiver expressed in general terms is insufficient to rebut. *Reece* v. *Georgia,* 350 U.S. 85 (1955). To conclude otherwise, would be an effective barrier which could never be overcome.

CONCLUSION

The petitioner has failed entirely to substantiate any issue of his petition and has been unable to demonstrate that the opinion of the court below is contrary to the pronouncements of this Court. Furthermore, it is sincerely urged that petitioner has not shown any new or unique circumstances which merit consideration. The petition for writ of certiorari should be denied.

Respectfully submitted,

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Nov. 5, 1965

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 9 0 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

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—v.—

DAN D. STEPHENS, Superintendent
of Arkansas State Penitentiary.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Comes now the petitioner and respectfully prays the Court to grant rehearing in the above styled cause. This Court denied the petition for writ of certiorari in this cause on December 6, 1965. Subsequently, certiorari was granted in *Miranda* v. *Arizona* No. 759, *Vignera* v. *New York* No. 760, *Westover* v. *United States* No. 761, and *Johnson, et al.* v. *New Jersey* No. 762, in which the Court will decide issues involving the right to counsel, the conditions giving rise to a valid waiver of constitutional rights, and the admissibility of evidence taken while or after a defendant has been denied counsel or has not been informed of his right to counsel.

It is uncontradicted that police officers deliberately refused to allow petitioner to contact his family or an attorney

although he made repeated requests to do so. Neither was he informed of his right to counsel when arrested. This petition for rehearing raises an issue not heretofore asserted and which is based on the granting of certiorari in the above cited cases: can a defendant knowingly waive *any* important constitutional right when he is simultaneously denied his request for counsel.

Direct Refusal of Counsel to Petitioner

The District Court specifically found "that when petitioner was taken into custody and incarcerated in the city jail, he was not permitted to see his parents or a lawyer" (Tr. 49). The petitioner testified that after being arrested at approximately 4:00 a.m. on November 3, 1961 and being taken to the hospital for identification by the victim, he was carried to the city jail in Hot Springs, Arkansas, and questioned.

During questioning at the city jail, petitioner made a direct request for counsel: "I asked them could I use the telephone to call my—my mother, somebody to come up, a lawyer, or something, and they told me I weren't going to use the phone for nothing . . . " (Tr. 189; see also Tr. 190). This denial of counsel occurred somewhere between 4:00 a.m. and 7:30 a.m. when the petitioner was taken from the jail to the house where the crime had occurred.

The refusal of counsel continued from the point of arrest on November 3, 1961 at 4:00 a.m. through November 7, 1961. The petitioner, upon being transferred from the Hot Springs jail to the Malvern city jail asked to make a phone call and the sheriff there said that he had instructions from the Hot Springs police not to let the petitioner talk

to anyone. All petitioner's testimony concerning the denial of his repeated requests for counsel was uncontradicted.

Failure to Inform Petitioner of His Right to Counsel

The arresting officer, when asked whether, when he took petitioner into custody, he advised petitioner Maxwell or his mother that they were entitled to consult with an attorney, said: "No, I didn't give them any advice at all, because I didn't know whether he was being arrested or what" (Tr. 267). Captain Crane testified that he did not advise petitioner of his right to consult an attorney when he was first arrested and held in the Hot Springs jail (Tr. 250).

Concurrent Search and Seizure

At 5:00 a.m. on November 3, 1961, an hour after the petitioner was taken into custody, the police officers returned to his home. They claim petitioner's mother permitted them to enter, and that she agreed to a search of the petitioner's room during which they took a blue coat later used in evidence against the petitioner at the state court trial. The blue coat was obtained without a search warrant (see opinion of the District Court, 229 F. Supp. 205, 209). The police officers testified they informed petitioner's mother that he was charged with rape. The accusatory process clearly had begun. The officers, however, did not inform petitioner's mother that petitioner (or she in conjunction with petitioner) had a right to advice from counsel before participating further in what was now a phase of the prosecution (Tr. 267).

The Court of Appeals below did not purport to find the search and seizure constitutional. It was not incident to a lawful arrest. There were no emergency circumstances which justified the failure of the police to secure a warrant. The majority of the court turned its decision solely on whether objection to the unconstitutionality of the search was waived by petitioner's mother having consented to the search "freely and intelligently." *Maxwell* v. *Stephens,* 348 F. 2d 325, 336.

The Impact of *Escobedo* v. *Illinois*

The above facts are uncontradicted but an issue raised by these facts has not been asserted heretofore: when a search is clearly unconstitutional, can the court hold that there was a waiver of the right to object to that search, when simultaneously police directly refused the defendant's request for an attorney and failed to inform him of his right to counsel. The question in another form is: can there be an intelligent and knowing waiver of legal rights by a layman who has been denied access to a lawyer?

The legal effect to be given to the voluntary consent by petitioner's mother to the seizure of his effects is the key to this case and has already occasioned a dissent in the Court of Appeals by one judge solely on that issue, although he did not rest his opinion on the denial of counsel. The majority of the Court below agreed that petitioner had standing to object to the conditions under which the evidence was obtained which was used at trial against him. (See *Maxwell* v. *Stephens,* 348 F. 2d 325, at p. 334.)

The cases where the Court has recently granted certiorari raise the issue of the admissibility of a confession. But

there is a grave question of whether *Escobedo* v. *Illinois*, 378 U. S. 478 bars not only a finding of voluntary waiver of the right against self-incrimination but bars also finding voluntary waiver of objection to an unconstitutional search when there has been a direct denial of counsel.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, JACK GREENBERG, one of the attorneys for petitioner, hereby certify that this Petition is presented in good faith and not for delay. The Petition for Rehearing is filed because subsequent to the denial of the writ of certiorari, this Court granted certiorari in cases which may have effect on the issues now asserted by the petitioner which have not been raised heretofore.

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JACK GREENBERG